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LIST OF AUTHORITIES.

STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.....

RUAN TRANSPORT CORPORATION, *Petitioner,*

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Respondent.*

WILLIAM D. HAWLEY, *Petitioner,*

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

TO THE HONORABLE FRED A. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Ruan Transport Corporation and William D. Hawley respectfully represent that:

I.

Summary Statement of the Matter Involved.

This action was originally commenced by Ruan Transport Corporation, an Iowa corporation, against Chicago, Burlington & Quincy Railroad Corporation, an Illinois cor-

poration, in the state court in Polk County, Iowa, to recover damages for the loss of a tractor destroyed in a collision between one of respondent's trains and that petitioner's tractor (R. p. 1). The respondent removed the cause to the District Court of the United States for the Southern District of Iowa, on the ground of diversity of citizenship (R. pp. 148-149). William D. Hawley, the driver of the tractor, then commenced an action in that United States District Court against respondent to recover for personal injuries sustained by him in the same collision (R. p. 1). The two cases were consolidated for trial to a jury, which rendered a verdict for Ruan Transport Corporation of $5,000.00 and a verdict for William D. Hawley of $22,500.00, and judgment was entered on the verdicts in favor of the respective plaintiffs on December 31, 1947 (R. pp. 128-129). The respondent railroad appealed from said judgments to the United States Court of Appeals, Eighth Circuit, which on December 23, 1948, filed its opinion and entered its judgment reversing the judgments of the district court and remanding the cases to the district court with directions to dismiss the complaints (R. p. 156). On the 4th day of January, 1949, the circuit court by order enlarged the time for filing petition for rehearing in the two cases to and including the 20th day of January, 1949 (R. p. 172). On the 19th day of January, 1949, the petitioners herein filed petition for rehearing in said cases in the circuit court (R. p. 173), and order overruling the petition for rehearing was entered therein on the 7th day of February, 1949 (R. p. 215).

This accident occurred at the 28th Street crossing in the City of Bettendorf, Iowa. 28th Street is an unpaved road 20 feet in width running North and South across five sets of railroad tracks, generally numbered in order from North to South as Tracks 1, 2, 3, 4 and 5. The main line track is Track 2 (R. p. 20). It is the fourth set of tracks to be crossed by a traveler from the South. There are no

crossing gates or warning signals at the crossing (R. p. 27). The rails on each set of tracks are 4 feet 8½ inches apart and between each set of tracks is a space 9 feet 9 inches wide (R. p. 19). Strings of freight and box cars 700 or 800 feet long were sitting on Tracks 3 and 4 about 75 feet east of the crossing (R. p. 39). A waiting train was sitting on Track 5 east of the crossing (R. p. 106). A passenger train operated by respondent was approaching from the East on Track 2, but view of its approach was completely obscured as far as the traveler from the South was concerned by the cars sitting on Tracks 5, 4 and 3 (R. p. 23), until the traveler had passed the north side of the line of cars on Track 3 (R. pp. 21, 79, 87, 89, 91).

The date was June 9, 1947, a fair clear day, and the time about 2:40 P. M. (R. p. 20). William D. Hawley was driving a tractor belonging to Ruan Transport Corporation and pulling behind him a tank loaded with 6300 gallons of gasoline (R. p. 20). The combined length of the tractor and tank was 45 feet (R. p. 24) and their weight loaded 30 tons (R. p. 40). Hawley sat about 8 feet back from the front of the tractor (R. p. 24). He was familiar with the crossing. Having loaded the tank at a bulk plant south of the crossing, Hawley approached the crossing from the south (R. p. 20). He stopped 8 feet short of the nearest rail of Track 5 (R. p. 24). His view from there was completely obstructed (R. p. 21). After looking and listening and taking a chew of tobacco from the pocket of his coat lying in the cab, he started up in his slowest gear and proceeded over the crossing at a speed of 2 miles per hour, looking and listening for trains all the while (R. p. 25).

As he passed the north side of the line of cars on Track 3, he saw the oncoming train for the first time about 250 feet from the crossing (R. p. 23). He stopped with his front wheels on Track 2 (R. p. 26) on which the train was approaching at a speed admitted to be 40 miles per hour (R. p.

83), but placed as high as 50 or more by plaintiffs' witnesses. (R. pp. 23, 55). He tried to back off the track but was struck by the train before he could move off the track (R. p. 23). The tractor was torn loose from the gasoline laden tank and hurled 45 feet away (R. p. 30). It was demolished and Hawley, trapped inside (R. p. 56), suffered painful and permanent injuries (R. p. 57). The tank and the gasoline remained where they were, undamaged.

The evidence as to when the whistle was first sounded was conflicting, the train crew testifying that it was at the whistle post 500 or 600 feet from the crossing (R. pp. 82, 84, 108), and Hawley and other witnesses for plaintiffs testifying that they heard no whistle from the train until it was 200 to 250 feet west of the crossing (R. pp. 23, 49, 55). The trial court submitted to the jury the question whether the railroad was negligent under all the circumstances in the speed at which the train was being operated and the warning of its approach which was given (R. p. 117). On appeal to the circuit court, respondent did not raise any question as to the sufficiency of the evidence on the matter of its negligence (R. p. 157).

At the close of all the evidence, respondent moved for directed verdict upon the ground that Hawley was guilty of contributory negligence as a matter of law (R. p. 113). In substance this motion raised the following propositions: (1) That Hawley was required to stop again before driving upon Track 2; (2) That Hawley could have seen the train in time to stop in safety after he passed the north edge of the line of cars on Track 3; and (3) That Hawley violated the requirements of Section 321.343, Code of Iowa, 1946, by not stopping within 50 feet and not closer than 10 feet to the nearest rail of the track. The trial court overruled the motion (R. p. 113) and later overruled respondent's motion for judgment notwithstanding verdict and for new trial raising the same grounds (R. pp. 135-136). On appeal to the

circuit court, the only issue raised was that of Hawley's contributory negligence as a matter of law (R. p. 157).

In reversing, the circuit court holds that as a matter of law Hawley violated the statute by not giving "his undivided attention to looking and listening for trains" while stopped, and by not stopping and looking and listening "at a point on track 3 where he had a view to the east of 75 feet and where he could have heard the train" (R. p. 171). The statute involved (Section 321.343, Code of Iowa, 1946) provides:

> "The driver of any * * * vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. No stop need be made at any such crossing where a police officer or a traffic control signal directs traffic to proceed. This section shall not apply to street railway grade crossings within a business or residence district."

It is not disputed that Hawley stopped his tractor with the front bumper eight feet from the nearest rail of Track 5, which was about 50 feet from the first rail of Track 2; that his view of the approaching train was completely obstructed at that point; and that after looking and listening while stopped there, he drove slowly on across the series of tracks without stopping again until he had driven out on Track 2 where he was unable to avoid being struck by the train. The trial court submitted the question of any violation of this statute and its causal connection with the accident to the jury (R. p. 123). The circuit court to the contrary held that Hawley had violated the statute as a matter of law and that such violation constituted contribu-

tory negligence which would bar recovery by him or his employer (R. p. 171). The circuit court cited as instances of Hawley's violation of this statute his alleged failure to give his undivided attention to looking and listening while stopped short of the tracks (presumably because he took out a chew of tobacco while stopped there), and his failure to stop again before driving out onto Track 2 (even though he had already made the stop required by the statute and there was no safe place to stop short of Track 2 at which he could have seen the approaching train, which was then several hundred feet down the track and out of sight behind the boxcars).

II.

Jurisdictional Statement.

Jurisdiction of this court is invoked under Section 240 of the Judicial Code of the United States (Title 28, U. S. Code, Sec. 347) and Rule 38 of the Rules of the United States Supreme Court. The order overruling petition for rehearing in the United States Court of Appeals, Eighth Circuit, was entered February 7, 1949 (R. p. 215).

Petitioners are advised by counsel and believe that the judgment of the court of appeals violates their rights in the following respects:

(1) The court has decided an important question of local law in a way probably in conflict with the applicable decisions of the Supreme Court of Iowa.

(2) The court has so grossly infringed upon and usurped the function of the jury in the case as to amount to a deprivation of petitioners' right to trial by jury, contrary to the Seventh Amendment to the Constitution of the United States.

(3) The court has so far departed from the accepted

and usual course of judicial proceedings as to call for the exercise of this court's supervision.

In these circumstances, petitioners request review under the federal statute above cited and Rule 38 of this court.

The following decisions of this court are believed to sustain jurisdiction to review and reverse the judgment of the Court of Appeals, Eighth Circuit:

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

Ruhlin v. New York Life Ins. Co., 202, 82 L. Ed. 1290.

Pokora v. Wabash R. Co., 292 U. S. 98, 78 L. Ed. 1149.

Wilkerson v. McCarthy, 93 L. Ed. (Adv.) 403.

III.

The Questions Presented.

The questions presented are as follows:

(1) Did the court of appeals err in holding as a matter of law that Section 321.343, Code of Iowa, 1946, required the driver of a vehicle to give his undivided attention to looking and listening for trains, while stopped before a railroad crossing?

(2) Did the court of appeals err in holding as a matter of law that Section 321.343, Code of Iowa, 1946, required the driver of a vehicle at his peril to make a second stop at a point where by listening he could hear the train when he had already made one stop within fifty feet and not less than ten feet from the track?

(3) Did the court of appeals err in holding that the alleged violations of Section 321.343, Code of Iowa, 1946, constituted contributory negligence as a matter of law which would bar any recovery by petitioners for the collision with the train subsequently occurring?

(4) Did the court of appeals err in holding as a matter of law that the alleged violations of Section 321.343 contributed causally as a matter of law to the subsequent collision?

(5) Did the court of appeals err in determining as a matter of law that the driver was guilty of contributory negligence and setting aside the judgments in petitioners' favor based upon the jury's verdict in their favor?

IV.

The Reasons Relied on for Allowance of the Writ.

A writ of certiorari should be granted for the following reasons:

(1) The court of appeals has placed an unwarranted and untenable construction upon Section 321.343, Code of Iowa, 1946, which would never be countenanced by the Supreme Court of Iowa and which conflicts with the probable local law of the State of Iowa.

(2) The court of appeals has held that the alleged violations of this statute constituted contributory negligence as a matter of law, contrary to the law of Iowa under which a statutory violation is not contributory negligence unless it has a causal connection with the injury.

(3) The court of appeals has refused to follow the local law established by the decisions of the Supreme Court of Iowa to the effect that if the traveler's view of an approaching train is obscured by obstructions, the question of contributory negligence is for the jury.

(4) The court of appeals has deprived petitioners of their constitutional right to have issues of fact passed on by a jury by passing on disputed fact issues itself and determining them against petitioners and contrary to the verdict of the jury thereon.

(5) The court of appeals ha in its opinion and judg-

ment in this case been guilty of such unreasonable, unfair, arbitrary and unlawful action to the prejudice of petitioners that this court ought to exercise its power of supervision to compel that court to conform to the accepted and usual course of judicial proceeding herein.

Wherefore, these petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the United States Court of Appeals, Eighth Circuit, to the end and that said cause may be reviewed and determined by this court as provided by law; that the judgment of the United States Court of Appeals, Eighth Circuit, be reversed and the judgment of the District Court of the United States for the Southern District of Iowa be reinstated; and that petitioner may have such other and further relief in the premises as to the court may seem appropriate and just.

RUAN TRANSPORT CORPORATION and
WILLIAM D. HAWLEY,

Petitioners,

By REX H. FOWLER,
D. J. FAIRGRAVE, and
HOWARD A. STEELE,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion Below.

The opinion of the United States Court of Appeals, Eighth Circuit, is reported in 171 F. 2d (Adv.) 781.

ARGUMENT.

I.

The court of appeals is in error in construing Section 321.343, Code of Iowa, 1946, to require "undivided attention" to looking and listening by a driver at a railroad crossing, and to require a stop more than ten and less than fifty feet from the track "where by looking he can see and by listening he can hear" the approaching train, and such construction is in conflict with the applicable local law of Iowa.

In this case, petitioners charge the court of appeals, first, with failure to follow and apply the Iowa law in construing and applying Section 321.343 to the conduct of the driver Hawley, and second, with a gross abuse of its judicial prerogative in overturning the verdict of the jury on the issue of contributory negligence in the case at bar. Petitioners are very conscious of the burden resting upon those who seek the aid of this court. They are advised that the court does not sit merely to correct the errors of lower courts, nor to give the defeated party in such courts another hearing. Yet it seems to petitioners that the conduct of the court of appeals as represented by its opinion and judgment in this case goes far beyond the bare commission of an error against them in its disposition of the case. They are of the belief that such court has abused its judicial discretion by failing and refusing to be guided by the de-

cisions of the Supreme Court of Iowa in the result it reached in the case, and by substituting its own conclusions on disputed issues of fact for those which were properly and constitutionally determined by the jury. They are of the opinion that the error of the court of appeals is so gross and palpable as to call for the intervention of this court to protect their fundamental rights as litigants in the federal courts.

It was certainly not the intent of Congress that a plaintiff should suffer any prejudice because, against his will, his case is tried in federal rather than state court. Since the decision of this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, it has been the settled duty of the United States courts of appeal to apply the local law, whether statutory or common law, to cases which are in federal court solely on the ground of diversity of citizenship. Accordingly the rules of this court (Rule 38, 5, b) provide that one of the grounds for certiorari to a circuit court of appeals is that such court has

> "decided an important question of local law in a way probably in conflict with applicable local decisions."

Whether the matter involved in this petition is "important" enough in this court's eyes to justify its intervention by way of certiorari is a question that can only be answered by the court itself. The question is important enough to the petitioner Hawley, a family man with four children, who has been disabled for life in an accident for which the railroad concedes its fault. He cannot be expected to know or care as to the importance of the case in the judicial scheme of things. But if the unjust and arbitrary judgment of the court of appeals is allowed to stand, that will be the most important fact in the whole of the rest of Hawley's life, for he is permanently injured,

unable to support his family by following his trade, and will be without redress for his injuries. Let this court tell Hawley and his wife and his children that this question is not "important", for his counsel cannot.

But in a larger sense, this case is important to the bench and the bar of the nation. No matter what the issues may be, or how they are decided, it is important that the courts of appeals perform their judicial duties in a lawful manner by respecting the command of this court that the local law must prevail. There is but one way for this court to assure litigants that this command will be obeyed, and that is by intervening whenever they have not, whether the litigation be otherwise of great or small importance. When a litigant suffers obviously and exclusively because his appeal has been submitted to a federal court of appeals rather than the highest appellate court of the state in which he resides, he ought to receive relief in this court, if only in order to keep the system of dual jurisdiction of state and federal courts in working order.

Some discussion of the history of this case and of the facts involved cannot be avoided at this point. Ruan Transport Corporation is an Iowa corporation engaged in hauling petroleum products by motor transport. William D. Hawley was one of their drivers, a citizen and resident of the State of Iowa. The respondent Chicago, Burlington and Quincy Railroad Company is an Illinois corporation. The action was first commenced in the District Court of the State of Iowa in and for Polk County by Ruan Transport Corporation against the railroad, and removed by the latter to the United States District Court for the Southern District of Iowa on the ground of diversity of citizenship (R. p. 149). To avoid a similar removal, Hawley's companion suit was commenced originally in that federal court, and the two causes were consolidated for trial.

These cases sought damages arising out of a collision

between a train operated by the respondent, and a tractor belonging to Ruan and driven by Hawley, at a railroad crossing on 28th Street in the City of Bettendorf, Iowa, on June 9, 1947 (R. p. 20). The record contains a plat of the locale of the accident (R. p. 19). There are five sets of tracks on the crossing, numbered from North to South as Tracks 1, 2, 3, 4 and 5 (R. p. 20). Track 2 is the main line, upon which the train approached from the East (R. p. 23). The space between the rails of each set of tracks measures 4 feet 8½ inches, and the nearest rails of each set of tracks are separated by a space of 9 feet 9 inches (R. p. 19). 28th Street is a rough dirt road about 20 feet wide running North and South across the tracks (R. p. 35). There are no crossing gates or automatic signals at the crossing (R. p. 27). South of the tracks the road turns abruptly to the west and runs parallel to the tracks for several hundred feet, leading to a number of gasoline bulk storage plants (R. p. 36). As many as 150 trips daily are made over this crossing by loaded gasoline trucks returning from these plants (R. p. 39).

On the day in question, Hawley, who was thoroughly familiar with the crossing, had just finished loading his unit at one of these bulk plants. He was driving a new International K-8 tractor pulling a tank or trailer loaded with 6300 gallons of gasoline (R. p. 20). The total length of tractor and trailer combined was 45 feet (R. p. 24), and their weight loaded was 30 tons (R. p. 40). Hawley knew that this train was due in Davenport, Iowa, at about 2:22 P. M., and he was watching for it, since he did not know whether or not it had gone by (R. p. 26). He came down the road from the west, parallelling the tracks, and approached the crossing at about 2:35 P. M. He stopped on the road first to wait for a Shell Oil truck, driven by one Glen Crites, to make the crossing (R. p. 48), and then he pulled his unit around the bend, keeping well to the left,

and came to a stop with the front end of his tractor about 8 feet from the nearest rail of Track 5 (R. p. 26).

At this point the front of Hawley's vehicle was about 50 feet from the nearest rail of Track 2 (R. p. 19), and as he would proceed north across the crossing, he would cross Tracks 5, 4 and 3 before reaching Track 2. The terrain was level and the tracks to the east were straight, but his view to the east, from which direction the train was approaching, was completely obscured by two strings of cars sitting on Tracks 3 and 4, commencing about 75 feet from the road and running seven or eight hundred feet away (R. p. 39), as well as by a switch engine and cars sitting on Track 5 (R. p. 106). The photographs Exhibits B (R. p. 21), and 7 and 8 (R. pp. 87, 89), taken soon after the accident, show the identical cars sitting on Tracks 3 and 4, and demonstrate how completely they obscured his view of the train approaching on Track 2. This obstruction to Hawley's view continued as he crossed Tracks 5, 4 and 3 (R. p 23), and until his line of vision passed the north side of Car No. 67009, which was the first car sitting on Track 3 (R. p. 25), about 75 feet east of the crossing. This car was 10 feet 8 inches wide (R. p. 111).

While Hawley was stopped short of the tracks, he looked and listened for trains in both directions, but saw or heard none (R. pp. 25, 26). To the east the obstructions prevented him from seeing more than 75 feet of the main line track, Track 2. The windows in his cab were down and the engine of his tractor was running quietly (R. p. 25). The day was clear, but there was a strong southwest wind blowing the sounds of the train away from him (R. p. 49). Perceiving no danger, Hawley put his tractor in creeper gear, the lowest gear, and proceeded on across the tracks at a speed of 2 miles per hour, or 2.9 feet per second (R. p. 23).

There is a conflict in the evidence as to just where the

train was and what it was doing at this time. When Crites crossed the track a few seconds before Hawley, he saw the train at a distance he estimated at one half mile down the track. After he had passed Hawley and saw the latter draw up to the track, stop, and then start up again, Crites feared Hawley might be hit, and got out of his truck to watch. He testified that the first whistle from the train he heard was when it was 200 feet from the crossing (R. pp. 49-50). Plaintiffs' witness Kaehler confirmed this testimony (R. p. 55). Hawley himself testified that the train whistled for the first time just as he first saw it as he pulled out on Track 2, when it was about 250 feet away (R. p. 23). Defendant's witnesses, including the train crew, testified that the train whistled for the crossing at the whistle stop, which was about 500 feet from the crossing (R. pp. 77, 81, 82, 84, 108). The fireman on the train sitting on Track 1 testified that he heard the whistle at a time when he figured the train would be a half mile from the crossing (R. p. 107). The train crew placed the train's speed at 40 miles per hour (R. pp. 84, 108), but Hawley and Kaehler estimated its speed at at least 50 miles per hour (R. p. 23, 55). It was a small train with only two cars (R. p. 83), but the jury could have found that it required nearly a thousand feet for the engineer to halt it, with all brakes set, after he first saw Hawley on the track ahead of him (R. p. 55). At 50 miles per hour the train would cover 73 feet in one second.

As Hawley drove slowly over the series of tracks, he continued to look and to listen for trains (R. p. 23). He sat about 8 feet back from the front end of his tractor (R. p. 21). When his line of vision passed the north side of Car 67009 on Track 3, Hawley had for the very first time an unobstructed view of more than 75 feet of Track 2, and saw the train coming down that track about 250 feet away, and for the first time heard its whistle (R. p. 23). Hawley stopped with the front end of his tractor just over the

north rail of track 2 (R. p. 26), within 3 feet and one second of time after he first saw and heard the train, but before he could back off the track the collision occurred.

Assuming that it required Hawley 17 seconds to proceed from the place where he stopped short of the tracks to where he was struck, it is obvious that the jury could find that the train was about 1500 feet from the crossing when Hawley started up and that this distance diminished by 73 feet for every 2.9 feet covered by Hawley.

The force of the collision tore the tractor loose from the gasoline laden trailer and hurled it to one side without damaging the trailer (R. p. 26). Hawley was pried out of the cab with crowbars (R. p. 55). He was unconscious for two weeks, but eventually made a fair recovery from his injuries, which included concussion, a broken neck, broken collarbone and cuts and bruises. However, he will have about a 35 per cent permanent disability of the spine for his life, since the broken neck did not heal perfectly (R. pp. 59-60). This will permanently prevent him from making a living by driving truck. The tractor was of course demolished.

At the close of plaintiff's evidence, defendant made a motion for directed verdict upon the ground of contributory negligence on Hawley's part, particularly because, after stopping at a point 8 feet from the nearest rail of the nearest track, he proceeded on across the other tracks without stopping again and without stopping before entering upon the track upon which he knew the train would come, all of which, according to the motion, was in violation of Section 321.343, Code of Iowa, 1946 (R. p. 71). The motion was renewed at the close of the evidence, and again overruled (R. p. 113).

The court of appeals concluded that it was error to refuse defendant's motion for directed verdict, and assigned as the *sole reason* therefor Hawley's alleged violation of

Section 321.343, Code of Iowa, 1946. This statute, which is part of the Motor Vehicle Code of the State of Iowa, states as follows:

> "The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty feet but not less than ten feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely.
>
> "No stop need be made at any such crossing where a police officer or a traffic control signal directs traffic to proceed.
>
> "This section shall not apply at street railway grade crossings within a business or residence district."

The court said in the opinion (R. p. 170):

> "But we need not debate the question of the present status of the Dean case, for *under an Iowa statute not involved in any other case as yet decided by the Iowa Supreme Court and never construed by that court, Hawley was required to stop before going over the crossing at a point where by looking and listening he could know that it was safe to proceed.* Section 321.343, Code of Iowa, 1946."

Thus the court at the outset placed the construction on the statute that the driver must, *at his peril,* stop, before crossing, *at a point where by looking and listening he could know that it was safe to proceed.* The court then said (R. p. 170):

> "The purpose of this statute is self evident. It is the legislature's command that the driver of one of the vehicles shall exercise a degree of care above and beyond that required of the driver of other vehicles at railroad crossings. In the light of the Iowa cases concerning the relative rights of motorist and railroad at railroad crossings, this statute must be read to mean that the driver of one of the vehicles described *shall stop within the distances specified where by looking he can see and by listening he can hear.* The command is that the driver shall not proceed until he knows that to proceed is safe."

Having thus declared that the driver *must* stop where by looking and listening he could see and hear the train, or be guilty of a violation of the statute, the court paused for a moment to announce another construction of the statute (R. p. 171):

> "Nothing less than the *undivided attention* of the driver to looking and listening is compliance with the statute. If it could be said that Hawley made a literal compliance with the requirement of the statute as to stopping before crossing, his own testimony shows that while he stopped he did not give his undivided attention to looking and listening for trains. He had no right to assume what he could not know."

In other words, not only must the driver stop at his peril at a place where by looking and listening he can detect the approach of a train, but he must also give his "undivided attention" to looking and listening while so stopped. While the court does not specify in what particular Hawley's testimony shows that he did not give "undivided" attention to looking and listening, it can only be referring to the fact that while stopped short of the tracks, Hawley took a chew of tobacco out of his coat lying in the cab.

The court then reverted to its original thought that the statute required Hawley to look and listen where he could see and hear the train, concluding:

> "We think the evidence shows beyond question that if Hawley had stopped and looked and listened at a point on track 3 where he had a view to the east of 75 feet and where he could have heard the train, the collision would not have occurred."

These remarks required about one page of the opinion. Without any more discussion, and without reference to any authority to support its view, the court of appeals in these few sentences held that the statute commanded Hawley to stop where by looking he could see and by listening he could hear, and to give his undivided attention to looking and listening, and that if he had stopped at a proper place, he could have heard the train, and there would have been no collision. See headnotes 5 and 7 to the case as reported in 171 F. 2d (Adv.) 781.

The first portion of this brief deals with the matter of the construction placed on this statute by the court of appeals. It is wholly and completely unjustified and erroneous, for it goes far beyond the wording of the statute, and requires the driver to act in a manner the statute itself does not contemplate. While it is true that the Supreme Court of Iowa has never construed this particular statute, nor its companion statutes Sections 321.341 and 321.344 of the Iowa Code, yet *that fact does not excuse the court from placing the same construction on the statute that it may believe the Supreme Court of Iowa would place,* as indicated by other decisions of that court and decisions of other courts construing similar statutes. The statute in question does set up a standard of conduct for the particular drivers referred to therein, over and above that required for ordinary motorists, that is true. However, *the statute expressly*

states what that standard of conduct is to be. Such drivers are specifically required, *first*, to *stop* within 50 feet but not less than 10 feet from the nearest rail of the railroad, and *second*, while so stopped, to *look* and *listen* in both directions for trains and signals of approaching trains, and *third, not to proceed* until they can do so safely. The court of appeals, however, requires the driver to go far beyond the express requirements of the statute, by requiring the driver to stop "at a point where by looking and listening he could know that it was safe to proceed".

This is not a mere paraphrase of the wording of the statute. The latter is satisfied if the driver stops and looks and listens at any point more than 10 and less than 50 feet from the first rail of the track. The court, however, demands not only that he stop within the distances specified, but also that he stop *where by looking he can see and by listening he can hear. That is not what the statute says,* and the court had no right to engraft such a requirement on the statute and then hold that to violate it was to violate the statute. The common law of Iowa as declared by the Iowa Supreme Court does not require a motorist to look and listen for trains at a particular point where he can see or hear them, on penalty of being guilty of negligence as a matter of law. One of the latest Iowa cases reviewing the rights and duties of motorists at railroad crossings is *Coonley v. Lowden*, 234 Iowa 731, 12 N. W. 2d 870, where the court set forth the following statements and says that they are affirmed by numerous Iowa decisions:

> "A traveler approaching a railroad must look when by looking he can see. *A traveler is required to look for approaching trains within a reasonable distance from the crossing, but not at any particular place nor at all points.* It is ordinarily *for the jury* to determine whether he selected a proper place for making obser-

vation, and otherwise used ordinary care for his safety. *When the jury could find that a traveler looked within a reasonable distance from the crossing, a court will not ordinarily say, as a matter of law, he was guilty of contributory negligence because he did not look again from some other designated point from which he might possibly or probably have discovered the train.*"

In *Markle v. Chicago, Rock Island and Pacific R. Co.*, 219 Iowa 301, 257 N. W. 771, the driver stopped about 15 feet from the track, where his view of the train was obstructed. It was contended he should have stopped again, closer to the track, where he could have seen the train. The authorities are reviewed, and the court holds the contrary saying at page 304:

> "It is impossible, *as a matter of law*, to say at what precise distance from a railroad track a traveler must stop to look and listen. This must be done within a reasonable distance from the track."

In *Langham v. C. R. I. & P. R. Co.*, 197 Iowa 1118, 198 N. W. 525, the driver stopped *50 or more feet* from the track on which the train was approaching, concealed by obstructions. Then he drove on slowly looking and listening for trains, over three sets of tracks, precisely as Hawley did in the case at bar. It was held that he was not guilty of negligence as a matter of law when he was struck by the train on the fourth set of tracks he crossed.

In other words, the *law of Iowa* is that *stopping*, if required, and looking and listening for trains by a motorist must be made *at a reasonable distance from the tracks.* Where the vehicles mentioned in Section 321.343 are concerned, the legislature definitely required that such stop and such looking and listening must take place *not less than 10 feet and not more than 50 feet from the nearest track.* It did not however purport to place upon such drivers the

duty of making such stop and such observations at their peril at a place where the train, if one was coming, could be seen and heard. That is *pure invention* on the part of the court of appeals, and no justification for it whatever appears in the statute.

The vital importance of this matter to the case at bar should be manifest. Hawley had *already* made one stop short of the tracks, as required by the statute. Under the Iowa cases, it was for the *jury* to determine whether or not that stop was within a *reasonable* distance from the track, and *he was not required, as a matter of law, to make a second stop* for the purpose of looking and listening. But the court of appeals, *contrary to the Iowa law*, held as a matter of law that the stop Hawley made was *not* sufficient, and that the *court, not the jury*, could say that he ought to have stopped *again*, on Track 3 where he might have detected the approach of the train. Thus for his failure to make his stop where, in the judgment of the court, he might have heard the train, Hawley is found by the court to be guilty of contributory negligence as a matter of law.

The law thus announced by the court of appeals is not the law of Iowa. That much is plain.

Under the rule announced by the court, Hawley would inevitably be found guilty of negligence in this case *from the mere happening of the accident*, because *that fact alone would show that he had not stopped and looked and listened where he could see or hear the train*, else no accident could have occurred. The court evidently justifies this construction by the direction appearing in the statute that the driver

> "shall not proceed until he can do so safely."

Many states have similar statutes but not one of them, so far as we can determine, has ever adopted such a construction of the law that the mere happening of the acci-

dent showed a violation of the statute and resultant contributory negligence. In *Dommer v. Pa. R. Co.*, (CCA 7) 156 F. 2d. 716, the decedent, driving a heavily laden Standard Oil truck, approached a crossing of two main line and one spur tracks. He stopped to let a train go by on one of the main lines, and then when he started up was struck by a train on the other main track. Indiana had a statute providing:

> "Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such railroad and *shall not proceed until he can do so safely* * * *."

The court, rejecting the contention that the driver was guilty of contributory negligence as a matter of law, said at page 719:

> "The defendant contends that the statute places a mandatory duty upon the traveler to do *two* things, (1) *to stop* within a certain distance from the nearest track, and (2) *not to proceed* thereafter until he can do so safely. The only controversy is as to the latter contention. We do not believe that the defendant's contention in this respect is realistic. If followed to a logical conclusion, it would mean that the very occurrence of a collision, under the circumstances shown by this record, would constitute contributory negligence as a matter of law."

In the case at bar, the court of appeals not only requires the driver to stop and look and listen, as does the statute, but *to do so where he will hear the train*, and not to proceed until he knows that to proceed is safe. Since Hawley did not do that, they say that he is contributorily negligent under the statute.

In *Heiny v. Pa. R. Co.*, (Ind.) 47 N. E. 2d 145, decedent was killed while driving a motor truck carrying gasoline

over a railroad crossing. The railroad relied upon an Indiana statute providing:

> "It shall be unlawful for any person when transporting any * * * inflammable material * * * by means of a motor vehicle * * * along any public highway which crosses any ** * railroad, to cross or drive upon the track or tracks of such railroad unless such person shall first bring such vehicle to a full stop, and shall *ascertain definitely* that no train * * * is approaching such crossing and is in such close proximity thereto as to create a hazard or danger of a collision."

The trial court directed a verdict for the railroad saying that it was self evident that if the driver had complied with the statute there would have been no collision, but the Indiana Supreme Court reversed, saying at page 147:

> "Under a strict interpretation of the act, the operator of such a vehicle is, in effect, an insurer of his own safety. He may not place any dependence upon the observance of the statutes requiring headlights on moving locomotives in the nighttime, or the giving of required signals, as such instrumentalities approach highway crossings. The impracticability of imposing such burdens upon the operator are well illustrated by the observations of Mr. Justice Cardozo in the case of *Pokora v. Wabash R. Co.*, 292 U. S. 98, 78 L. Ed. 1149 * * * We hold therefore that *the decedent's conduct, like that of appellees, is to be measured by the standard of ordinary care.* It will not be presumed that the decedent was guilty of contributory negligence merely because there was a collision between his truck and the locomotive."

The case of *Kline v. Pa. R. Co.*, (CCA 6) 9 F 2d 290, involved an Ohio statute. A school bus driven by plaintiff was struck by a train. The statute provided that the driver of such a vehicle must

> "Bring it to a full stop before crossing the tracks of any railroad * * * line and not (to) proceed across such tracks until *absolutely certain* that no car or train is approaching from either direction."

The court said at page 292:

> "It is contended for the railroad that, measured by the demands of the statute, it was his duty to *know* that a train was not approaching before attempting to cross the track, and the fact that he was struck on the crossing was of itself such evidence of breach of duty as to amount in law to negligence. *We do not so construe the statute.* The phrase 'absolutely certain', in our opinion, refers to the state of mind of the ordinarily prudent driver, and not to the fact, for one may be certain that a train is not approaching when in fact one is."

There is not the slightest reason in the world to doubt that the Supreme Court of Iowa will follow these well considered cases when the construction of Section 321.343 comes before that court, and that it will reject the false interpretation placed upon the statute by the court of appeals. The Iowa court has always been most liberal in railroad crossing cases, from the point of view of the plaintiffs therein, and tendency is on the increase rather than the other way around. That court would never adopt a construction of the statute which, contrary to its holdings in numerous cases, would require Hawley, (at the peril of being found negligent as a matter of law if he failed,) to stop at the one place at which he could have perhaps heard the train and avoided the accident.

As for the court's declaration that the statute required Hawley to give *undivided* attention to looking and listening while stopped, this is pure imagination by the court. The *statute* requires the driver, while stopped, to *look and listen* for trains. It does not hint in any way that the driver must

give undivided attention to such looking and listening *at all times* while so stopped. The idea that Hawley actually violated this statute because he reached in his coat and took out a chew of tobacco while he was stopped there is nothing short of monstrous. Yet that is the only fact or circumstance in the record that the court could possibly be referring to when it speaks of "undivided attention". Obviously a man is not prevented from looking and listening for trains because he takes a chew of tobacco. Not even counsel for the railroad ever made any such contention as that. The court of appeals has dreamed it up out of thin air.

Another error of law committed by the court of appeals was its total failure and refusal to recognize that under the law of the state of Iowa any violation of this statute, if any was shown, would not constitute contributory negligence unless some *causal connection* were shown to exist between the violation and the accident which subsequently occurred. From beginning to end of the opinion, there is no mention of this principle of law, although it was of vital importance in the case. It is of course the law of Iowa. In *Carlson v. Meusberger*, 200 Iowa 65, 70, 204 N. W. 432, the court held that although violation of one of the provisions of the motor vehicle code would be negligence per se, it would not necessarily constitute contributory negligence, saying:

> "But the fact that his view was obscured, and that his failure to sound a signal of his approach, as required by the statute, was negligence, would not be conclusive upon the question of contributory negligence. *There would remain the question whether such negligence had any causal relation to the collision.*"

In *Banghart v. Meredith*, 229 Iowa 608, 294 N. W. 918, the plaintiff failed to give the statutory signal of intent to

turn, under this chapter of the Code, and the court said at page 613:

> "The failure of plaintiff * * * had no causal relation to and did not contribute to the accident because the accident would have occurred even though the signal had been given * * *. We conclude the question of plaintiff's contributory negligence was for the jury."

In *Engle v. Nelson*, 220 Iowa 771, 263 N. W. 505, plaintiff failed to set out a flare when required to do so by the statute. The court said at page 777:

> "It is elementary, and we have frequently held, that *a violation of a statutory requirement is immaterial if such violation was not a direct or contributory cause of injury.*"

The Iowa court has not yet said the same thing about Section 321.343, but it will certainly do so when the question reaches it. Other courts construing similar statutes have invariably made reference to the matter of causal connection. Thus in *Dommer v. Pa. R. Co.*, (CCA 7) 156 F. 2d 716, (the case is referred to and the statute quoted at page 23 *supra*), the court said at page 718:

> "Further, we are of the view that a violation of the statutory provision under discussion would not constitute contributory negligence as a matter of law. * * * 'to warrant a reversal on the ground of appellee's negligence, it must be conclusively shown that such negligence contributed to the accident'. Thus *the mere fact that the statute was violated does not establish defendant's legal proposition.* The question of contributory negligence in respect to the violation of the statute was properly submitted to the jury."

In *Heiny v. Pa. R. Co.*, (Ind.) 47 N. E. 2d 145, (the statute is quoted at page 24 *supra*), the Indiana Supreme Court said at page 147:

> "That it was within the purview of the legislature to make it a public offense for operators of motor vehicles to transport inflammables and explosives over railroad crossings without exercising more than ordinary care cannot be doubted. *Whether such a violation constitutes contributory negligence as a matter of law is quite another matter.*"

In *Kline v. Pa. R. Co.*, (CCA 6) 9 F. 2d 290, (the case is cited and the statute quoted at page 24, *supra*), the court said at page 292:

> "This statute * * * imposed a duty on the plaintiff and if in failing to perform it, he so contributed to the accident that, but for his failure, it would not have occurred, he cannot recover.

It cannot be disputed that, under the law of Iowa, a violation of this statute would not be contributory negligence unless it had a causal connection with the ensuing accident. The trial court followed that law when it left it to the jury to determine whether any such connection existed between any such statutory violation and the collision. The court of appeals ignored that law when it decided the matter of contributory negligence as a matter of law.

The court of appeals finds, *hidden* in that statute, a mandate not apparent to ordinary eyes, which requires that Hawley must take precautions *not mentioned by the statute* to avoid collisions at railroad crossings, in *excess* of those which ordinary motorists must take. As a result, in the court's *own words*, even if Hawley made a "literal compliance with the requirement of the statute as to stopping before crossing", he is *still* negligent as a matter of law under the statute because he did not give "undivided attention" to looking and listening while stopped, or because he did not stop again, *where his view was still obstructed* to look and listen for the train, and all of this without regard to

whether such attention or such stopping and listening would have prevented the accident which followed. This is plain injustice, and it is not the law.

Another thing must be said about the construction placed on the statute by the circuit court of appeals. It appears that the *statute itself* would *forbid* a stop *on the tracks* such as the court held Hawley should have made. The statute says that

> "Before crossing at grade any *track or tracks* of a *railroad*, (the driver) shall stop such vehicle within fifty feet but *not less than ten feet* from the nearest *rail* of such *railroad* * * *".

The statute thus plainly contemplates that a "railroad" may have several "tracks" and what is enjoined by the statute is a stop within 50 and not less than 10 feet from "the nearest rail of such *railroad*". It is as plain as plain can be that the driver is only required to stop once, more than 10 and less than 50 feet from the *first* track, and that he is *not* required to make a separate stop before crossing *each* track where the railroad has more than one track—certainly at any rate not unless there is room to stop between each set of rails "within fifty feet but not less than ten feet from the nearest rail". In the present case, if Hawley had stopped *on* Track 3 as the court of appeals say he should have, before crossing Track 2, he would have failed to observe the mandate of the statute that *no stop be made within ten feet of Track 3*. Hawley's unit was 45 feet long and if he had stopped on Track 3, it would have extended back across Track 4 and Track 5. There was a steam locomotive with a string of cars behind it sitting on Track 5. There was a string of cars on Track 4 and another on Track 3. Was he required *as a matter of law* to stop his unit squarely on these railroad tracks, *contrary to this statute*, not knowing when the switch engine might start up again,

nor when the sitting cars might be shunted down upon him? Compare the language of Mr. Justice Cardozo in *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 78 L. Ed. 1149, at 1154:

> "Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. * * * Where was Pokora to leave his truck after getting out to reconnoitre? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat."

The idea of the court of appeals that Hawley ought to *stop again*, where he could *not* see the track on which the train would come, *for the sole purpose of listening*, when such stop would place him and his dangerous cargo in front of the cars and the train on Tracks 5, 4 and 3, is one which would appear to many reasonable persons to require an imprudent act. If he had stopped, and the cars or the train had moved and struck his unit, can it be doubted that the railroad would be in court complaining loudly because Hawley had stopped squarely on the tracks, in violation of section 321.343? The court of appeals thus has held Hawley negligent as a matter of law for *not* doing what most persons would certainly agree he should *not* have done, and what the statute itself expressly forbids, namely, stopping his vehicle *on* the railroad tracks. A railroad track is always a place of danger, no matter how great the care may be that the traveler exercises.

The federal system which sets up judges from other states to pass upon and declare what is the law of the state of Iowa, according to which the parties are entitled to be judged, is obviously going to leave much to be desired unless those judges are diligent and painstaking in their search for such local law, and willing to defer their own

views to it when it is found. Railroad crossing cases are common. This case was tried before the Honorable Charles A. Dewey, who retired from the bench on March 1, 1949, after 21 years of service as United States District Judge and 19 years experience before that as a judge of the District Court of the State of Iowa. His view about this case, based on his forty years experience as a trial judge in the State of Iowa, was that under the law of Iowa the question of contributory negligence here was clearly one for the jury. His judgment has been overturned by a court composed of one judge from Minnesota, one from Nebraska and one from Arkansas. The latter wrote the court's opinion.

Petitioners cannot but recall with bitterness the following language from an opinion written by one of the same judges who sat in the case at bar, appearing in *Russell v. Turner*, (CCA 8) 148 F. 2d. 562, 564:

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error. * * * This does not mean that an appellant, in order to obtain a reversal of the judgment in a case such as this, must demonstrate error to a mathematical certainty, but it does mean that this court will not overrule a decision of a trial judge upon a question of state law except for cogent and convincing reasons. * * * All that this court can be expected to do in reviewing cases governed by state law is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the law."

This is fine language indeed, but the case at bar makes a joke out of it. A judgment based on the local law of Iowa, which was the result of forty years' experience in the law of Iowa on the part of the learned trial judge has been reversed by a court composed of nonresidents, not because

any Iowa statute or decision of the Iowa Supreme Court *expressly* and *plainly requires* it, but in order that the court may substitute its own views of what the law of Iowa ought to be for those of the court below. That is wrong. It is not to be endured. It ought to be prevented.

II.

The court of appeals has ignored the applicable law of Iowa and deprived petitioners of their constitutional right to a jury trial by deciding itself that Hawley violated the statute by not giving undivided attention and by not stopping again and that if he had stopped at a proper place the collision would not have occurred, those being disputed questions of fact for the jury.

Even if it could be said that the court of appeals made a proper construction of the statute, and that it gave due recognition to the need for a causal connection between any violation thereof and the subsequent accident, under the Iowa law, the court still had no proper right to decide the question of Hawley's contributory negligence as a matter of law. Hawley never had a chance to *see* this train before he reached the danger zone, too late to avoid the accident. His opportunity of *hearing* the train was certainly no greater than was that of the plaintiff in scores of Iowa cases involving obstructed crossings, in which the question of contributory negligence has invariably been held to be one for the jury. Not one single Iowa case can be found in the reports in which a traveler who had no opportunity to see an approaching train has been held contributorily negligent as a matter of law *solely because he must have heard its approach* if he had listened. That question is *always* one of fact for the determination of the jury, not the court.

The 7th Amendment to the Constitution states that the right to trial by jury shall be preserved, and

> "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In conformity to this constitutional mandate, the question of contributory negligence in the case at bar was submitted to the jury, which found for the petitioners. The power of the court of appeals to reverse the jury's findings, under the Constitution, is limited to those cases in which the fact of plaintiff's negligence and its causal relation to the accident are *so far undisputed that all reasonable men must agree,* both that the plaintiff was negligent, *and that such negligence did contribute to the causing of the accident.*

By failing to act in accordance with these limitations, the court of appeals has effectively deprived these petitioners of their constitutional right to have disputed fact issues submitted to the jury. As this court but lately said in *Wilkerson v. McCarthy,* 93 L. Ed. (Adv.) 403, 409:

> "Peremptory instructions should not be given in negligence cases where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences. • • • Such has ever since been the established rule for trial and appellate courts. • • • Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function."

In *Markle v. C. R. I. & P. R. Co.,* 219 Iowa 301, 257 N. W. 771, a case which on its facts greatly resembles the case at bar, a judgment based on the jury's verdict for the plaintiff was affirmed on appeal, the Iowa Supreme Court saying at page 303:

> "Appellant contends that decedent, under the facts, was guilty of contributory negligence as a matter of law. In a discussion on this question the evidence

must be considered in that light most favorable to the plaintiff. * * * 'Embraced within this question is not the problem of determining with whom the preponderance of evidence may be; rather the situation presents the necessity of judicially saying that under the record the jury could find no evidence upon which a verdict could be based. If the appellee's own testimony is sufficient in this regard, it must be submitted to the fact finding body; * * * Obviously it cannot be said as a matter of law the effect of appellee's actions in the premises is so conclusive of his contributory negligence that the same is apparent to every fairminded and reasonable man so but one conclusion may be fairly drawn therefrom'."

No apologist for the court of appeals could say that its opinion in the case at bar met these tests, for *it has assumed to decide adversely to petitioners* the gravest questions of fact in the face of either *direct evidence in the record to the contrary*, or a *conflict* therein *which it had no right to resolve.*

Take the matter of the court's bland statement that *Hawley's own testimony* shows that

> "while stopped he did not give his undivided attention to looking and listening for trains."

Here is the *only testimony in the entire record* on that subject: Hawley testified on direct examination:

> "I stopped on the southern most side of the crossing. The windows were rolled down. I never heard any vibration or whistle or sound of anything on this train while I was stopped." (R. p. 20)
>
> * * * * *
>
> "As I stopped south of the tracks I did not observe any locomotive or train moving on any of the tracks." (R. p. 23)

On cross examination, in answer to the question, "How long did you stop?", Hawley testified:

> "Well, I was stopped—I can tell you exactly, approximately. I stopped, I had a leather coat folded up between the seat and the cab. I chew Copenhagen. I unfolded the coat, took out a chew of Copenhagen, both windows were down, and at the same time I was looking when putting the coat back. I was looking East because I knew that train was due along there, East. I never heard a sound or nothing and couldn't see it." (R. p. 25)

He further testified:

> "After I stopped and had observed that my view was obstructed and after I had obtained some snuff from my coat pocket I started up again and went north along the gravel road across those tracks." (R. p. 26)

The court of appeals had *no right* whatever to *infer* from this testimony that Hawley did *not* give undivided attention to looking and listening while stopped short of the tracks. If any question of this sort existed, it was for the *jury* to consider the evidence and decide whether it could have amounted to a violation of the statute or contributory negligence. That was *not* the function of the court of appeals.

When the court of appeals, in the case at bar, pronounces Hawley guilty of contributory negligence as a matter of law for failure to give his "undivided attention" to looking and listening for trains while stopped short of the crossing, it *overlooks completely the fact that this could not possibly have contributed as a matter of law to the causing of the accident.* While Hawley was stopped there, his view was *at all times completely* obstructed by the intervening cars on Tracks 5, 4 and 3, and "*undivided attention*" *to looking would have revealed no more than he did see in any*

event. Furthermore, the train was at that time presumably somewhere between a half and a quarter mile from the crossing, or the jury might so have found, because it was only *after* Hawley had driven *50* feet at 2 miles per hour, or *2.9 feet per second*, that he saw the train, moving at *50* miles per hour or *73 feet per second*, *250* feet from the crossing. (R. p. 23) Plaintiffs' witnesses gave evidence which would indicate that the train whistled for the first time when it was 200 feet from the crossing. (R. pp. 23, 49, 55) Even the train crew claimed only that the crossing signal was given at the whistle post 500 feet from the crossing. (R. p. 84) It is therefore equally obvious that *there was no more to be heard* by "undivided attention" to *listening* at that point than Hawley heard anyway, which was absolutely nothing. At any rate, it must be beyond dispute that at best Hawley's conduct while stopped short of the crossing made only a jury question on his contributory negligence, and not one which the court of appeals had any right to take upon itself to decide against him as a matter of law.

The same thing is true as far as the court's declaration that he violated the statute by *not stopping again* is concerned. To be sure the court says that "if Hawley had stopped and looked and listened at a point on track 3 where he had a view to the east of 75 feet and where he could have heard the train, the accident would not have occurred." But Hawley *always* had a view to the East of 75 feet, because the lines of cars on Tracks 3 and 4 did not begin until about that distance from the crossing. But what justification has the court for assuming that Hawley must, as a matter of law, have *heard* the train if he had stopped on Track 3? Even after Hawley drove on across Track 3 and out on Track 2, the train was 250 feet away. If we reverse the clock for the train at 73 feet per second, and for Hawley at 2.9 feet per second, we see that if Hawley had made a stop on Track 3 which would have been about 15 feet short of

where he did in fact stop when he saw the train, the *train* would then have been *over 500 feet from the crossing.* Plaintiffs' witnesses made it a jury question whether any signal was sounded by the train *before 200 feet* from the crossing. For example the witness Crites, who had crossed the crossing ahead of Hawley and actually saw the train coming a half mile away, testified that *the first whistle he heard* was when the train was about 200 feet from the crossing. (R. p. 49) *Under the circumstances the jury was entitled to find that even if Hawley had stopped on Track 3, he could have seen nothing and heard nothing, so that the accident would not have been prevented.* By what possible right can the court of appeals find the contrary as a matter of law?

Evidently the court of appeals in this case based its decision as to Hawley's contributory negligence *squarely* upon the proposition that if Hawley had stopped again at some proper place, *he could have heard the train* and the collision would not have occurred. See headnote 7 in the case in 171 F. 2d 781. Nowhere in this entire case at any point did the respondent's counsel ever make the contention that Hawley must, as a matter of law, have been able to *hear* this train and thus avoided this accident by stopping before he did. The court of appeals came to this conclusion absolutely *on its own.* And where is the *evidence* that the court relies on to justify it in holding as a matter of law that Hawley must have been able to hear this train if he had stopped again? *There is not a syllable in the opinion itself to indicate how or why the court arrived at this conclusion,* except the bare declaration that if Hawley had stopped again

> "where he could have heard the train, the collision would not have occurred." (R. p. 171)

To resolve the matter of cause against petitioners without discussion or comment in the opinion, when the question was one to be decided on the conflicting evidence by the jury, was extremely improper action on the part of the court of appeals, for which petitioners see no possible justification.

When it did so the court of appeals did what the Supreme Court of Iowa has steadfastly refused to do in crossing or intersection cases, and that is *determine as a matter of law after an accident has happened* that *if the driver had stopped somewhere else or done something different* than what he did in fact do, the *accident would not have occurred.* In *Butterfield v. C.R. I. & P. R. Co.*, 193 Iowa 323, 325, 185 N. W. 151, 152, the court said:

> "This contention, that if, by use of engineering instruments or by laying a straight edge upon a map or blue prints made at leisure after the tragedy, it is made to appear that, if the traveler on the highway had looked from some designated station or standpoint, and if the train ha dthen been in direct line of vision, he could then have discovered it and avoided a collision, the court must say, as a matter of law, that his failure to do so is contributory negligence, is one which has been, with great persistence and tireless repetition urged upon the court during the half century or more of the era of railway development in Iowa; and * * * *we have steadily held that, if the traveler is shown to have looked and listened when within reasonable distance of the crossing, the court will not attempt to say, as a matter of law, that he is guilty of contributory negligence because he did not look and listen again at some other designated point, from which he might possibly, or even probably have discovered the train.*"

The same thought was repeated by the court in the recent case of *Lathrop v. Knight*, 230 Iowa 272, 297 N. W. 291, an intersection case, where it was said at page 276:

> "It is to be remembered that when speeds and distances are spoken of, we are dealing with estimates and not with certainties. For that reason we think it is to no purpose to make computation to prove as established fact that either or both of the drivers should have done or omitted doing certain things in the exercise of ordinary care. * * * We are dealing in fractions of seconds, and courts cannot say as a matter of law which of the two parties was to blame. The question is for the jury to decide upon the evidence submitted."

However the court of appeals does the very thing which the Iowa court will not do, when it announces that *if* Hawley had stopped and listened somewhere else, he would have heard the train and the accident would not have happened.

The opinion of the court is not as clear as it might be. It is possible that the court intends to refer back to some previous sentences of the opinion as the basis for its bare conclusion that if Hawley had stopped on Track 3, the collision would not have occurred. Earlier in the opinion the court of appeals says: (R. pp. 169-170)

> "And the fact is that Hawley did not look when he could have looked just before driving his tractor on the track where the collision occurred. His testimony is that he neither saw nor heard the train until his tractor was across both rails of track 2. But the distance between tracks 3 and 2 was 9 feet 9 inches, and even allowing for the overhang of the cars on track 3, Hawley, if he had been looking, must have seen the train before he did; and if he had stopped at a point even where his view to the east was only 75 feet, the collision would not have occurred."

The strange thing, and one which has mystified petitioners, is that *there is no basis in fact in the record at all for the court's conclusions in these sentences.* Yet the court makes the gravest charges against Hawley. A court which

had so ill-founded a conception of the factual situation in the case at bar was not competent to arrive at any correct and just conclusion as to Hawley's contributory negligence.

Contrary to what the court says above, Hawley's testimony was that *he was looking at all times to the east while driving over the crossing.* He testified:

> "I had my eye looking toward the east, *kept looking.*" (R. p. 23)

How can the court say he was not looking just before he drove onto Track 2? The jury was entitled to believe Hawley when he said he kept looking.

Contrary to what the court says, Hawley's testimony was *not* that he did not see or hear the train until his tractor was across both rails of Track 2. Here is his actual testimony: (R. p. 26)

> "When I first saw the train the *front bumper* of my tractor was across both rails of track 2. But the distance No. 2 track. The front axle, the front drivers of the tandem tractor was sitting on the southernmost rail I figured of No. 2 track when I first saw the train. * * * The bumper was over the other track, over the north rail of the track that the train was on. The front wheels were in line with the south rail."

The tractor had six wheels, with four drive wheels in tandem in the rear. The bumper was over the north or far rail of Track 2, but the two front drive wheels were just in line with the south rail of Track 2 (R. p. 26). Even if this distortion of the evidence is unintentional, it is a grave matter to petitioners, for the court is trying to make out at this point that there was *some measurable interval of time* before the accident when Hawley could have *seen* the train and avoided the accident if he had been looking.

Not only above, but also in stating the facts, the court of appeals contrives to give the impression that Hawley was

not looking, else he must have seen the train before he did. The court says: (R. p. 159)

> "Although Hawley testified that he continually looked to the east and listened for a train approaching from the east from the time he started his tractor across track 5, he neither saw nor heard a train until the front bumper of his tractor was over the north rail of track 2."

Under the record here, the jury could hardly do other than find that Hawley could not see this train until his line of vision passed the north side of the cars on Track 3. However, Hawley sat 8 feet back from the front end of his tractor (R. p. 24). The first car on Track 3 was No. 67009, which was 10 feet 8 inches wide (R. p. 111), so that it overhung the rails of Track 3 by 3 feet. Hence, while it was 9 feet 9 inches between Track 3 and Track 2, *the overhang of the cars on Track 3 reduced this space to about 6 feet 9 inches*, and *as soon as Hawley himself cleared the north side of those cars*, the *front end* of the tractor was *already a foot or two over the south rail* of Track 2. Just a little pencil work on the plat will show that these are the physical facts in the case.

Hawley stopped with his front bumper just across the north rail of Track 2, which was just about three feet from where it was when he first was able to see the train (R. p. 26). He stopped within one second of time from the instant on which he was first able to see it. For all practical purposes it must be said he saw the train and stopped simultaneously. Yet the court of appeals suggests that he was not looking or he would have seen it sooner. *That would have been impossible.*

Counsel for the railroads have frequently made similar claims about what could have been seen in safety by the traveler after he passed a line of obstructing cars, for-

getting or ignoring the overhang of the cars on the track and of the approaching train, but the court of appeals is the first court to be taken in by such argument.

For instance, in *Markle v. C. R. I. & P. R. Co.*, 219 Iowa 301, 257 N. W. 771, the court said at page 307:

> "Defendants contend that he should have stopped his truck again when he was six or eight feet from the track where he could have seen the train. It is fair to assume that if he had stopped when *he* was six or eight feet from the track, the *front end of his truck* would be *practically on the track or in very close proximity thereto.* It is a matter of common knowledge that the sides of a train are not flush with the rails but extend out a foot or more beyond the track. This would put him closer to the zone of danger than the track, and his view would therefore be obstructed until he came within five or six feet of the danger zone. After stopping within ten or fifteen feet of the track, he started toward the track at a rate of approximately two miles an hour. The point from which he could first see an approaching train being only five or six feet from the danger line, he could cover this distance in about two seconds. It can hardly be contended that under such circumstances, a person would be guilty of contributory negligence as a matter of law in not so doing."

This language applies almost word for word to Hawley's conduct in the case at bar, and absolutely refutes the statement of the court of appeals that Hawley must have seen the train before he did. In *Anderson v. U. S. Railroad Admn.*, 203 Iowa 715, 211 N. W. 872, the space between the tracks was *20* feet. The court said at page 717:

> "The driver testified that she looked as best she could, and listened for the train, but did not hear it, or any signal of its approach; that she looked when she passed the end of the car, at the first opportunity, when she could see in that direction and then saw the train * * *. The distance between the nearest rails of the

main track and the track on which the cars stood was 20 feet. The automobile was about 15 feet long and it was a little over 8 feet from the front bumper to the driver's seat. It is a matter of common observation that the sides of railroad cars and engines extend beyond the track rails. *The jury would have been warranted in finding that, when the driver of the automobile first saw, or could have seen, the train, as she passed the end of the standing car, the front of the automobile was then only 8 or 10 feet from a point where it would be struck by a passing train on the main track.* * * * It it well settled that a traveler is not required, as a matter of law, to stop before going upon a railway crossing. * * * The driver had a right to rely to some extent upon the giving of proper signals by those operating the train. * * * If there was no noise from the automobile that interfered with her hearing while it was in motion, *it cannot be said that the driver was required to stop and look at a point where she could not have seen the train.*

The driver in that case had considerably more opportunity to see and hear the train than did Hawley in the case at bar, but she was held *not* to be contributorily negligent as a matter of law. If the court of appeals had paid any attention to the Iowa law at all, except the barest lip-service, it could not have failed to perceive that Hawley was not necessarily to be found negligent because he did not avoid being struck by a train he never had a chance to see, and the approach of which he and his witnesses testified he could not hear.

It is not only the decisions of the Iowa Supreme Court that were thus cast aside, but the court of appeals also ignored this court's opinion in *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 78 L. Ed. 1149, on facts *almost identical* with those in the case at bar. The plaintiff was struck by a train while driving his truck across a railroad crossing in Springfield, Illinois. There are four tracks of which

the main line is the third. A string of box cars was standing on the side track and cut off plaintiff's view of the tracks to the north, from which direction the train was approaching on the main line track. Plaintiff stopped his truck about 10 or 15 feet from the first track and looked and listened for trains. Still listening, he crossed the track and was struck by a passenger train from the north. This court held that plaintiff was *not* guilty of contributory negligence as a matter of law. Mr. Justice Cardozo, speaking for the court, said at page 1152 of 78 L. Ed.:

> "The record does not show in any conclusive way that the *train was visible to Pokora while there was still time to stop.* A space of eight feet lay between the west rail of the switch and the east rail of the main track, but there was an overhang of the locomotive, perhaps two and a half or three feet), as well as an overhang of the box cars, which brought the zone of danger even nearer. When the front of his truck had come within this zone, Pokora was on his seat, and so was farther back (perhaps five feet or even more), just how far we do not know, for the defendant has omitted to make proof of the dimensions. * * * For all that appears, he had no view of the main track northward, or none for a substantial distance, till the train was so near that escape had been cut off. * * * *In such circumstances the question,* we think, *was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing,* unaided by that of sight. * * * Here the fact is not disputed that the plaintiff did stop before he started to cross the tracks. If we assume that by reason of the box cars, there was a duty to *stop again* when the obstructions had been cleared, *that duty did not arise unless a stop could be made safely after the point of clearance had been reached.* * * * For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged. No stop would then have helped the plaintiff if he

remained seated on his truck, or so the triers of the fact might find."

The facts in this case are quite similar to those in *Bush v. Chicago, R. I. & P. R. Co.*, 216 Iowa 788, 247 N. W. 788. There were two tracks, of which the main line was the second. On the first was a string of box cars about 125 feet from the crossing, which hid the approaching train from view. The trucker stopped short of the first track and drove slowly on to be hit by the train which came on at a rapid rate of speed. The question of his contributory negligence was held to be one for the jury, the court saying at page 793:

> "With the record showing that appellee's view was *obstructed by the box cars on the siding* so that it rendered it difficult or almost impossible to learn of the approaching train, the question of contributory negligence is one of *fact* and not of law."

The burden which must successfully be sustained by one who asks a court to take the question of contributory negligence from the jury in such a case as this one is well known. By failing to contest the matter of its negligence on the appeal, the railroad in effect conceded for the purposes of this case that it was in fact negligent in operating its train at improper speed and failing to give adequate warning of its approach to the crossing as alleged by plaintiff which negligence Hawley was not required to anticipate. Under these circumstances, it would require a *very strong* case of negligence on Hawley's part to justify the court of appeals in setting aside the verdict of the jury and dismissing the cases on that ground. And this simply is *not* such a case.

From beginning to end the opinion is replete with "statements of fact" which are *either at variance with the uncontradicted record* in the case, or are facts which the

court of appeals *finds* from *conflicting* evidence. Taken one by one, their effect might be small, but all together their cumulative effect is deadly, for they serve clearly to convey the impression that statute or no statute, Hawley could and should have seen and heard this train in time to have avoided the collision, when *as a matter of fact the exact opposite is the truth.* For instance, the court says: (R. p. 160)

> "On cross examination he * * * (said) that he knew when this particular train was *due*, that he was always on the lookout for it, and that *to his knowledge it had not passed* the crossing at the time he approached track 2."

But the *record* shows that what Hawley *actually* said was this: (R. p. 26)

> "I knew that this particular train was *overdue.* It was due in Davenport about 2:22. * * * I always did watch out for this train. *It hadn't gone by yet to my knowledge. I didn't know whether it went by before I got down to load or not.*"

See how neatly the court has paraphrased Hawley's actual words to make it appear that he admitted that he knew the train was *due*, and had not yet gone by, when he actually said it was *overdue* and that he did *not* know whether or not it had gone by. If it be said that this is a small matter, let us point out that later in the opinion the court casts aside every Iowa case involving railroad crossing collisions with the following statement: (R. p. 169)

> "The fact which distinguishes this case from all other Iowa cases which counsel has brought to our attention or which our research has found is that *Hawley knew that the train which struck his transport was due at the time he approached track 2.*"

Having misstated the record to find a fact adverse to Hawley in his supposed knowledge that the train was due just as he approached the crossing, the court uses this "fact" to justify it in completely ignoring the Iowa cases which it was duty bound to follow. *And even then the court was wrong.* We have already referred to and quoted herein at page 42 from the case of *Anderson v. Railroad Admn.*, 203 Iowa 715, 211 N. W. 872, in which the plaintiff's car was struck on the fourth of a series of tracks, her view being obscured by cars standing on the intervening tracks. This case was set out in the appellees' brief in the court of appeals. Therein the court says at page 716:

> "The driver was familiar with the crossing and its surroundings and had observed the standing cars when she passed a short time before the accident. *She knew the train was due and had not passed.*"

Another Iowa case which the court's research might have disclosed is *Davitt v. Railroad*, 164 Iowa 216, 145 N. W. 483, where the court says at page 221:

> "He also testified that *he knew the train was due* at or near the time, perhaps a little later, and that he was on the lookout for it."

In both of these cases it was held that the question of plaintiff's contributory negligence was for the jury. It has remained for the court of appeals to turn the driver's knowledge of the train's schedule against him, for the Iowa court has never even hinted that this was possible.

Note next the way the court handles the evidence with regard to the sounding of the train whistle: (R. p. 161)

> "There was *some* evidence that the whistle was not sounded until the train was within 200 or 250 feet of the crossing. Of those who testified for the appellees Hawley was the only one *who had any reason to be*

> *listening* for the whistle. The witnesses * * * for appellees * * * *merely* said that they did not hear a whistle or bell until the engine was within 200 or 250 feet from the crossing. Witnesses for appellant, *not connected with either party* to the litigation, heard the whistle when the train was 600 or 700 feet from the crossing. One witness for appellant, the fireman on the switch engine * * * waiting on track 5 for the arrival of the train which struck the truck, and *who had some reason to listen* for the sound of the approaching train, testified that the whistle was first sounded when the train was ½ mile east of the crossing and again at the whistling post 500 feet east of the crossing * * *. Crites, who was the driver of the truck which passed over the crossing just before the accident, saw the train about ½ mile distant when he came over the crossing. *He did not say whether he had heard the whistle* as he came over the crossing."

Why was the court of appeals concerned with the fact that some of the railroad's witnesses were "not connected with either party to the litigation"? Or that some of appellees' witnesses "merely" testified that they did not hear the whistle or bell? Or that Hawley was the only one of them who had "reason" to be listening? Or that the fireman on the switch engine "had some reason to listen" for the train? The answer is obvious. *In spite of the fact that it was the court's duty to give petitioners the benefit of every reasonable inference from the testimony of its witnesses,* the court actually was in its own mind *weighing the testimony* of *all* the witnesses and *arriving at inferences and conclusions therefrom unfavorable to petitioners.* Thus we are led to infer that the testimony of Crites for plaintiffs was of little value. The court fails to remark that he was just as *disinterested* a witness as any for the railroad, and *contrary to what the court says* about his testimony, he *did* state that *he heard no whistle* from the train until it was 200 feet from the crossing. He testified: (R. pp. 49-50)

> "When I first noticed the steam and smoke it would possibly be 200 feet east of the crossing. *That is the first whistle that I had heard.* * * * That is about the time that I heard the whistle for the first time."

Of course the court seems to forget that the issue here is not whether or not the *train whistled* a half mile from the crossing but whether or not *Hawley* must have been able to *hear* the whistle. The railroad's negligence is not in issue, so the question is not whether the train whistled but whether Hawley could hear it.

Again it might be asked whether these matters are important to the ultimate decision. The answer lies in the court's opinion, where it says:

> "We think the evidence shows beyond question that if Hawley had stopped and looked and *listened* at a point on track 3 * * * *where he could have heard the train*, the collision would not have occurred."

On the record, the court concludes as a matter of law that Hawley *could* have *heard* the train if he had stopped again. It is able to do so only because it has played plaintiffs' evidence down and defendant's evidence up in the manner shown above. *In point of fact, the evidence clearly presented a question for the jury as to when the whistle was first sounded and when Hawley, who testified that he was listening, could or must first have been able to hear it.*

Later the court says: (R. pp. 169-170)

> "The *fact* is that *Hawley did not look* when he could have looked, just before driving his tractor on the track where the collision occurred."

The *fact* as shown by the *record* is the *opposite* of what the court says it is. Hawley testified that as he drove he "kept looking". The train was not visible to Hawley until he had driven past the line of cars on Track 3, by which

time his vehicle was already on the track in front of the train and the accident could not be avoided. No matter how hard Hawley looked he could not have seen this train before he drove out on track 2.

The court says: (R. p. 170)

> "His testimony is that he neither saw nor heard the train *until his tractor was across both rails of track 2.*"

Contrary to what the court says, his testimony was he saw the train and stopped with *only the bumper of his tractor* across the far rail of track 2. This would be within about one second of time or 3 feet after the train first became visible to him after he passed the north side of Car No. 67009 on Track 3.

The court says: (R. p. 170)

> "Even allowing for the overhang of the cars on track 3, Hawley, if he had been looking, *must have seen the train* before he did."

But if we allow 3 feet for overhang of the *cars* on Track 3, and 3 feet for overhang of the *train* coming on Track 2, the 9 feet 9 inches of space between the tracks was reduced to *less than 4 feet.* The bumper of Hawley's tractor was across the first rail of Track 2 before he could see the train and when he stopped it was just across the far rail of the track, about 3 feet farther. *Contrary* to what the court says, *there was no interval during which Hawley could have seen the train before he did.*

The court says: (R. p. 170)

> "If he had stopped at a point even where his view to the east was only 75 feet, *the collision would not have occurred.*"

Contrary to what the court says, Hawley had already stopped once at a point where his view to the east was only

75 feet. The train was hundreds of feet up the track at the time. If he had stopped again, it would still have been several hundred feet up the track. *When he finally did see the train, it was still 200 to 250 feet from the crossing,* and he was out on the track in front of it. A stop where his view was only 75 feet would never have prevented the collision.

As the Iowa court said in *Schuster v. Gillispie*, 217 Iowa 386, 390, 252 N. W. 85:

> "Before a violation of statute will preclude recovery, causal relationship must exist between the unlawful act and the injuries complained of."

No fairminded person could say in the case at bar that there was not room for reasonable difference of opinion on the question of whether such "violations" of the statute as the court of appeals laid to Hawley could have contributed to the causing of the accident.

There are so many Iowa cases in which the plaintiff has been held not to be guilty of contributory negligence as a matter of law on facts much *less* favorable to him than those in the case at bar that petitioners can only refer to a very few of them in this brief. The fact which marks the present case as unusual is that the view of the track on which the train was coming was *completely obstructed* by the intervening cars until Hawley had already reached a place of danger on the track before the oncoming train. In *Shepherd v. Bremner*, 220 Iowa 1, 260 N. W. 48, 50, the court says:

> "Where the traveler's view is obstructed, however, and he makes an effort to ascertain whether or not a train is approaching and is unable to do so because of an obstruction to his view, the question of whether the care used measures up to that which an ordinary prudent person would have exercised under the circumstances usually becomes a question for the jury. (Citing

cases.) This is particularly true if he continued to listen for the train and was in position to have heard the sound of the signals of the train as it approached the crossing. (Citing cases.) * * * The fact that he might have avoided the accident had he acted differently is not the test."

In each of the following cases, where the driver's view was almost completely obscured by standing cars on one of several tracks at a crossing, and in each of which the driver stopped short of the series of tracks and then proceeded slowly on while looking and listening, exactly as Hawley did in the case at bar, it was held that the question of his contributory neigligence was one for the jury. *Bush v. C. R. I. & P. R. Co.*, 216 Iowa 788, 247 N. W. 645; *Langham v. C. R. I. & P. R. Co.*, 197 Iowa 1118, 198 N. W. 525; *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 78 L. Ed. 1149. In the following cases, where the view of the driver was obscured almost completely until he was on the crossing, and where he drove slowly onto the crossing while looking and listening as did Hawley, it was held that he was not guilty of contributory negligence as a matter of law even though he failed to stop at all before trying to cross: *Coonley v Lowden*, 234 Iowa 731, 12 N. W. 2d 870; *Sterlane v. Fleming*, 236 Iowa 480, 18 N. W. 2d 159; *Anderson v. U. S. Railroad Admn.*, 203 Iowa 715, 211 N. W. 872; *Corbett v. Hines*, 194 Iowa 1344, 191 N. W. 179; *Zellmer v. Hines*, 196 Iowa 428, 192 N. W. 281; *Nederhiser v. C. R. I. & P. R. Co.*, 202 Iowa 285, 208 N. W. 856. Lately in *Mast v. Ill. Central R. Co.*, (D. C., N. D. Iowa) 79 F. Supp. 149, the court in making a general review of the Iowa law on this subject said at page 174:

"The latest pronouncement of the Iowa Supreme Court concerning the issue of freedom from contributory negligence in railroad crossing collision cases is *Kinney v. Larsen*, Iowa, 1948, 31 N. W. 2d 635. In that case the Court states that *where the view at a crossing*

is so obstructed as to render it impossible or difficult for a person approaching it from the road to learn of the presence of an oncoming train, or there is evidence of diverting circumstances which tended to throw such a person off his guard, the question of a person involved in a collision at such a crossing having been free from contributory negligence is ordinarily for the *jury.* It is believed that this pronouncement is in accord with the established law."

The court's decision in the case at bar is diametrically opposed to that pronouncement of the established law of Iowa. That principle was applied in *Bush v. C. R. I. & P. R. Co.*, 216 Iowa 788, 247 N. W. 645, where the trucker stopped 12 feet from the first of a series of two tracks, where his view was obstructed by boxcars 125 feet from the crossing, and then drove slowly on, to be struck by a train on the second track. The court said at page 793:

> "With the record showing that appellee's view was obstructed by the box cars on the siding so that it rendered it difficult or almost impossible to learn of the approaching train, the question of contributory negligence is one of fact and not of law."

The principle was applied in *Markle v. C. R. I. & P. R. Co.*, 219 Iowa 301, 257 N. W. 771, where the trucker stopped between ten and fifteen feet of the track, where his view was obstructed by weeds and a knoll, and drove on at 2 miles per hour, only to be struck by a train he could not see. The court said at page 308:

> "The crossing in question was obstructed in such a manner as to make it practically impossible to see the approaching train until it was almost upon him. These facts bring it within the rule announced in the cases hereinabove referred to. The question of contributory negligence was for the jury."

In *Anderson v. U. S. Railroad Admn.*, 203 Iowa 715, 211 N. W. 872, plaintiff stopped short of the first of five tracks, where her view was obstructed by cars on the side tracks, and drove on slowly for over fifty feet before being struck by a train on the fourth track which she knew was due and for which she was watching. The court said at page 717:

> "If there was no noise from the automobile that interfered with her hearing while it was in motion, it cannot be said that the driver was required to stop for the purpose of listening. Nor was she required to stop and look at a point at which she could not have seen the train."

In *Zellmer v. Hines*, 196 Iowa 428, 192 N. W. 281, the driver was struck on the third of a series of three tracks, his view being almost completely obstructed by a fence and by cars on the sidings. The court said at page 436:

> "He could gain knowledge of a train approaching from the east only by exercising his sense of hearing, which he was duly exercising."

And see *Pokora v. Wabash Ry. Co.*, 292 U. S. 98, 78 L. Ed. 1149, where the trucker, after stopping short of a series of four tracks, drove slowly on and was hit by a fast train on the third track, which he had no opportunity to see because of cars sitting on the side tracks.

In its argument in the court of appeals, the only Iowa case that respondent railroad put forward as justifying its demand for a directed verdict was *Dean v. C. B. & Q. R. Co.*, 211 Iowa 1349, 229 N. W. 1349, in which the driver, without ever stopping, approached a private crossing in a cut which completely hid the approaching train, and attempted to drive slowly across. He was struck by the train which was coming on rapidly about 50 feet away. He was held to be contributorily negligent in failing to stop. However, the case has never been subsequently cited except when the

physical facts showed that there was ample time to see the train and stop before the collision. In *Coonley v. Lowden*, 234 Iowa 731, 12 N. W. 2d 870, where the driver's view was obstructed until he was 12 or 15 feet from the track, the majority of the court held that he was *not required to stop* as a matter of law, while the minority would have held the contrary. Again in *Sterlane v. Fleming*, 236 Iowa 480, 18 N. W. 2d 159, the court held that a driver was not required to stop at even a completely obstructed crossing if he exercised some care in other respects.

It must be at once obvious that the case at bar does not resemble the *Dean* case at all on its facts, even if the *Dean* case could still be considered to state the law of Iowa as to a required stop. But the court of appeals was ready to find in the case sufficient authority to hold Hawley guilty of contributory negligence as a matter of law if it had not had the statute (Section 321.343) to fall back on instead. (R. p. 169) Why the court saw a precedent in the *Dean* case, but not in the more recent cases which hold the contrary, and which are far closer on their facts to the present case than it was, these petitioners cannot fathom.

In fact, the court of appeals has been guilty of such gross and careless misstatements of the evidence and such arbitrary holdings on the disputed matters of fact in this case as to leave these petitoners entirely perplexed and completely bewildered. They do not see how any competent and impartial judge can review the evidence which was before the jury in the case at bar and come forth with the conclusion that a fairminded man *could not say* that Hawley was free from contributory negligence. The Iowa cases pretty well fix the respective rights and duties of railroad and traveler at crossings, and an experienced trial judge who was thoroughly acquainted with those cases had no difficulty whatever in reaching the conclusion that under those cases this case was one for the jury.

The act of the court of appeals in taking this case from that jury was a riding roughshod over the established principles of law which govern such matters. The court's opinion shows that it, not the jury, has tried and determined this case, and that it, not the jury has found Hawley guilty of contributory negligence on the conflicting evidence. The court disregards such evidence as it chooses, and comments slightingly on such as tends to discredit the result it reaches. Counsel for petitioners have never before been confronted with an equal or comparable invasion of the province of the jury on the part of any court anywhere.

CONCLUSION.

This brief is long, but the nature of the subject matter has prevented its summary discussion. The outcome is of great importance to the petitioners, particularly to William D. Hawley. If the judgment of the circuit court stands, he has no redress for those injuries which have crippled him for life and closed his chosen method of livelihood to him.

The opinion of the court of appeals, when contrasted with the actual record in the case, shows that that court has grossly abused its appellate functions here. It is not often that litigants must complain of unfair and injust treatment at the hands of such a court, but this is such a case. The court adjudges Hawley guilty of contributory negligence as a matter of law when the facts are in dispute, and thus deprives him and his co-petitioner of their constitutional right to the verdict of the jury on such issues. It justifies its finding by misstating the facts shown by the record, or by drawing inferences adverse to Hawley where the evidence is in conflict. It construes an Iowa statute and finds Hawley guilty of violating its unexpressed commands.

Despite the fact that it was the duty of the court to seek out and apply the law of Iowa in this case, instead it an-

nounced that every Iowa case involving the rights and duties of travelers and train at a railroad crossing was distinguishable, and hence it followed none of them. The statute the court construed has never been construed by the Iowa Supreme Court, but the court did not turn to other Iowa cases on statutory violations, nor to cases construing similar statutes from other jurisdictions, to find what the Iowa law probably would be. Instead the court in a few brief sentences announced that under this Iowa statute, Hawley was required to stop within the distances which it specified, where by looking he could see and by listening he could hear, and give his undivided attention to looking and listening while stopped, and that if Hawley had made another stop he could have heard the train and the accident would not have happened. Thus the court overturned the verdict of the jury and the judgment of a judge who has served for forty years on the bench in Iowa. The railroad, while not disputing its negligence, goes scot-free, and Hawley, who could not see the train and whose witnesses testified that he could not hear it, is pronounced guilty of contributory negligence as a matter of law, because he did not stop somewhere else than where he did stop, to listen for a train he was already listening for anyway.

These petitioners are entitled to be judged according to the law of the state of Iowa and to have a jury, not the court, pass upon the conflicting evidence in their case. The judgment of the court of appeals deprives them of these rights. The case has not been decided in accordance with the local law of Iowa, nor has the jury been permitted to judge in a case in which not only that law but the Constitution of the United States guarantees its right to do so.

These petitioners pray that the writ of certiorari may issue.

Respectfully submitted,
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In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 644

RUAN TRANSPORT CORPORATION,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Respondent.

WILLIAM D. HAWLEY,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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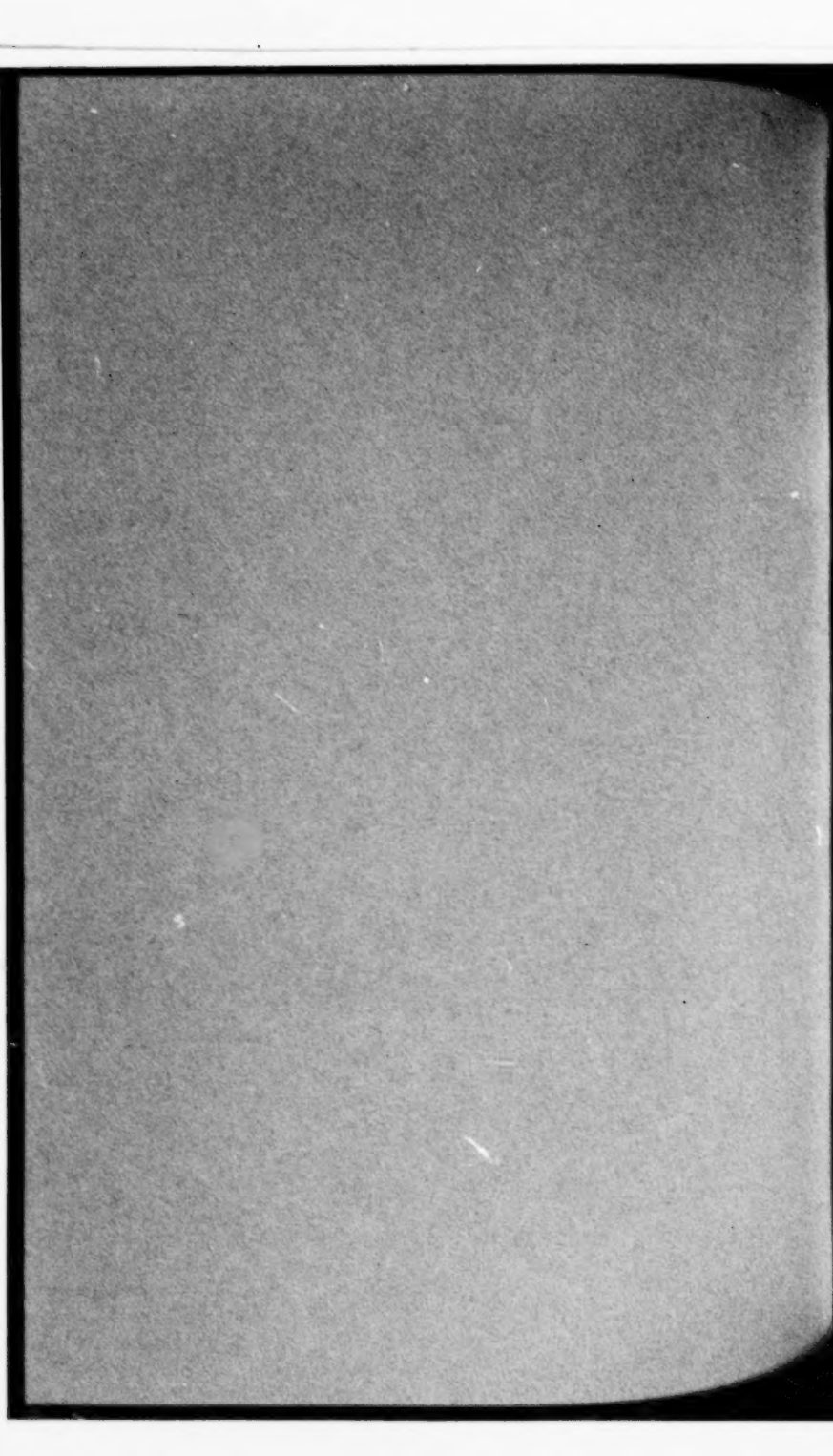

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STATUTES CITED

In the
Supreme Court of the United States

—o—

OCTOBER TERM, 1948

No.....

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RUAN TRANSPORT CORPORATION,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent.

WILLIAM D. HAWLEY,

Petitioner.

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION

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I.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported in 171 Fed. (2d) 781.

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II.

JURISDICTIONAL STATEMENT

The jurisdiction of the Federal Courts in this litigation is based solely upon diversity of citizenship of

the parties. Ruan Transport Corporation, an Iowa corporation, commenced its action in the state court and it was removed upon petition of defendant railroad company, an Illinois corporation. Hawley, an Iowa citizen, commenced his action in the United States District Court for the Southern District of Iowa. The actions were consolidated for trial and determination.

Petitioners ask for the issuance of the discretionary writ of certiorari to review the decision of the Court of Appeals of the Eighth Circuit, reversing judgments for the plaintiffs. That decision is reported in 171 Fed. (2d) 781.

In general it may be said that the writ should issue only where uniformity of decision between the courts of appeal is the goal sought (*Magnum Import Co. v. Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. ed. 922), or where the question is of general importance and it is in the public interest to have it decided by the court of last resort. And as to questions controlled by state law, conflict among the Federal Courts of Appeals is not of itself a reason for granting the writ. *Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

It is true that as stated in the last case cited, the writ may be granted "where a circuit court of appeals has decided an important question of local law in a way probably in conflict with applicable local decisions." But we propose to show that as to the common law of Iowa on contributory negligence, the Court of Appeals decision presents no conflict; and that as to its interpretation of the statute involved, there could be no

conflict, since it is conceded that in that respect there was and is no "local decision."

We will direct attention first to the latter proposition. When the statute in question (Sec. 321.343 Iowa Code, 1946) was cited in Respondent's motion for directed verdict, the trial Judge said, "I never heard of it." (R. 71); yet this law had been a part of the Iowa Code since 1937 (Chapter 134, Sec. 368, Acts 47th G. A.). There has never been any Iowa court interpretation of the statute, however. As to the effect of the rule of the Erie case in such a situation, Judge John J. Parker has said recently that the Erie rule "does not require that federal courts follow state decisions which state courts are not bound to follow, nor that they abdicate their judgment and enter into the field of speculation as to what state courts might do in cases they have not decided." 35 Am. Bar Assn. Journal 21.

In the case of *New England Mutual Life Ins. Co. v. Mitchell,* 118 Fed. (2d) 414, 420 the same distinguished jurist, in his opinion said:

> "Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn

duty in the premises and embark upon a vain and illusory enterprise."

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III.

STATEMENT

The adroitness of Petitioners' statement of facts, through the medium of certain important omissions, understatement in respect to some facts, and overemphasis as to others, produces a result which is misleading and unfair.

Nowhere is there any mention of the fact that all of the tracks crossing 28th Street, where the unfortunate accident here involved occurred, were owned and controlled, not by Respondent, but by the Davenport, Rock Island and Northwestern Railway Company (R. 106); that the only rights Respondent had were running rights on track No. 2, which it enjoyed together with certain other railroads; that, except for track No. 2,—the operating track,—these tracks were used for storage and switching; that this track No. 2 was the one on which the train involved in the accident had to travel; these latter facts being known at all times by Hawley, the driver of the Ruan truck (R. 25).

Petitioner says that "*as he passed the north side of the line of cars on track 3,* he saw the oncoming train for the first time." (Emphasis supplied.) What does the record show? Hawley testified:

> "When I first saw the train the front bumper of my tractor was across both rails of the main line track, or number 2 track. The front axle, the front

drivers of the tandem tractor, was sitting on the southernmost rail I figured of Number 2 track when I first saw the train. * * * I was only going 2 miles per hour. I put on the brakes, then went into reverse. She moved back, I couldn't say how far." (R. 26)

The record shows that this tractor had tandem or dual drivers, four drivers on each side. The front drivers which were "sitting on the southernmost rail of Number 2 track" were 178 inches back from the front bumper. Hawley was seated 106 inches back of the front bumper or 6 feet in front of the front drivers. These figures are computed from Petitioners' Exhibit No. 1 (R. 44). They show that when Hawley first saw the train, according to his own testimony, he was seated several inches north of the north rail, for it is undisputed that the track was of standard gauge, 4 feet 8½ inches between rails (Exhibit A, R. 18). Hawley testified that the distance from the front bumper to where he was sitting was 7½ or 8 feet (R. 24). If this figure is used instead of the exact figures of Petitioners' Exhibit No. 1, he must have been even further to the north of the north rail when he first saw the train. Even if the cars on track No. 3 had been right up to the edge of the highway instead of 75 to 80 feet down track No. 3 to the east, and even if Hawley had been driving on the east side of the road instead of "way over on the left-hand side as far as possible" (R. 26), he would have passed beyond the line of overhang of the cars on track No. 3 at a point approximately 8 feet south of the south rail of the running track (track No. 2). If the reverse operation to which he testified had taken place then or soon thereafter, any such reverse movement at all

would have put Hawley clear of danger. However, it is not necessary to resort to such hypothesis, as, under the facts of record, the distance of the cars on track No. 3 from the crossing is pretty well established as between 75 and 80 feet (R. 25) and his view from the west side of the road must have enabled him to have a much earlier view.

The following facts should be kept in mind:

1. Physical facts. 28th Street runs north and south on the outskirts of Bettendorf, which one witness said had a population of "roughly" 7,000 (Population, 1940 census, 3,143). The railroad station was a mile distant. The five tracks crossing this street east and west were owned by the Davenport, Rock Island and Northwestern Railway Company, not the Respondent, and there is no record that the latter had other than running rights, these rights being limited to No. 2 track, where the accident occurred (R. 120).

Petitioner's Exhibit G (R. 36) shows a sign at the south end of this crossing, reading "trainmen must not block this crossing 400 ft. away," a sign presumably posted by the owner of the tracks for the direction of its employees. The photograph, Exhibit 7 (R. 87), shows the spot at the south end of the crossing where Hawley stopped, not primarily to look or listen and not at all to comply with the Iowa statute, but to give anoher motorist, Crites, room to make the turn and also so that Hawley himself could obtain a pinch of snuff from the package in the pocket of his coat lying on the seat beside him (R. 25 and 48). If he did look, the picture shows that at that point looking for the train which

he knew was due was a futile act. As he moved northerly over the tracks for the next 40 or 50 feet, however, the train, which Crites had seen (R. 48), was drawing nearer, and the sounds of its approach necessarily increasing in volume. Moreover, the relative heights of the locomotive (15 ft. 2 in.) on the main track, No. 2, and the freight cars (11 ft. 11 in.) on the siding, not to mention the smoke from the engine, gave to the highway traveler visual knowledge of the train's approach even before he emerged from the freight cars' line of overhang,—that is if the traveler looked. This highway was used almost exclusively by gasoline trucks, the estimated total traffic being 150 round trips per day; not what could be called heavy traffic. The terrain was level and the running or main track was straight for a mile east of the crossing.

2. Hawley's conduct. As stated by Petitioner, Hawley was thoroughly familiar with the crossing (R. 20 and R. 26, 27), knew of this train, that it was past due, that "it had not gone by yet to the best of my (his) knowledge" (R. 26), and he knew on which track this passenger train would travel. He also knew, as stated by his counsel, of the dangerous character of his cargo, 6300 gallons of gasoline. With this knowledge, the only stop he made was at a point 40 to 50 ft. from the track on which he knew this train would travel, and at a point where he knew his view was obstructed. The reasons for this stop have been stated. Then, with his vision utterly obstructed, a fact of which he was at all times aware (R. 26), and utterly ignoring both the duty of a prudent man and the statutes' mandate, that he not proceed until he could "do so safely," he drove the dis-

tance to the main track and then onto that track without again stopping. He does say that he kept looking, but the physical facts show that if he did, he must have seen the train before he admits he did, when the front bumper of his tractor "was over the north rail of the track the train was on" and his drive wheels were "in line with the south rail of that track." (R. 26)

3. The operation of the train. It is common knowledge that a train traveling at 40 m. p. h. makes considerable noise. Moreover, except for the testimony of a few witnesses who "did not hear" them, there is no question that the customary warning signals were given. Within the mile east of the crossing, the engineer whistled three times and gave the regulation blasts for this crossing (R. 82). His positive testimony is corroborated by several disinterested witnesses who were in a position to hear. The bell was automatic and rang continuously (R. 82-84). There was no valid city ordinance regulating the speed of trains.

The Court of Appeals did not reverse the judgments for the Ruan Transport Corporation and Hawley solely upon the basis of the statute (Sec. 321.343, Code of Iowa, 1946) although it found in that violation a circumstance sufficiently contributing to the occurrence of the accident to bar recovery. Neither did it reverse the judgments because the truck driver failed to look or listen at a particular place. It found ample ground for reversal upon the undisputed physical facts which showed clearly that if Hawley had actually exercised these precautions at any time when and place where such precautions were not to his knowledge futile, he could have

seen and heard the train in time to have avoided the accident.

IV.

QUESTION PRESENTED

The sole question presented is whether or not the Court of Appeals for the Eighth Circuit was in error in reversing judgment for petitioner in each of the consolidated cases and directing a dismissal on the ground of contributory negligence.

V.

REASONS RELIED ON FOR DENIAL OF THE WRIT

1. The interpretation of the Court of Appeals based upon Section 323.343, 1946 Code of Iowa, is not in conflict with the local law of the State of Iowa for the reason that the Supreme Court of Iowa, being the only appellate court in that state, has never had occasion to interpret the statute and there is nothing in the Iowa reports to indicate what its position will be.

2. The Court of Appeals very properly held that the violation of the statute was a contributing cause of the injury and constituted contributory negligence barring recovery in each case.

3. The Court of Appeals very properly followed the law of the State of Iowa with reference to the rights and duties of motorists approaching railroad crossings where the view is obscured as determined in the case of

Dean v. C. B. & Q. R. R. Co., 211 Iowa 1347, 229 N. W. 223.

4. Petitioners have been deprived of no constitutional rights whatever because (a) there is no constitutional question in this case, (b) the seventh amendment to the constitution of the United States has no application to these cases, (c) no constitutional question was raised either at the trial or before the Court of Appeals either at the time of submission or at the time of petition for rehearing.

5. The Court of Appeals has been guilty of no misconduct whatever. It has merely decided these cases adversely to the petitioners.

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VI.

ARGUMENT IN OPPOSITION TO PETITION

A. The Court of Appeals committed no error in its construction of Section 321.343, Code of Iowa, 1946.

Petitioners' diatribe against the able and conscientious judges of the court below requires no reply. Suffice it to say that such scurrility is neither justified by the record nor by the opinion.

Petitioners apparently wish this court to believe that Hawley is in the Federal Court "against his will" (Pet. Arg. p. 11), although the record shows that the Ruan case only was commenced in the state court, the Hawley case having been initiated in the Federal Court. Hawley at least cannot complain of any imaginary loss of rights, privileges or advantages claimed by him to have been

prevailing in the state court, when he himself chose the forum.

In a totally immaterial discussion of the alleged importance of this case to Hawley, petitioners state on page 11 of their argument that "the railroad concedes its fault." This statement the respondent denies without qualification. No such concession was made or suggested at any time, including the present, and its existence lies solely within the overactive imagination of counsel for the petitioners.

We have no particular quarrel with petitioners' discussion of the facts except for a potentially misleading statement on page 14 of their argument, where it is said that when Hawley stopped short of the tracks he looked and listened for trains but saw or heard none. In this connection it must be remembered that at that point Hawley's view was obstructed. Defendant's Exhibits 7 and 8 (R. 87, R. 89) were taken immediately after the accident from a point almost identical with that at which Hawley was sitting when he claims to have stopped and looked. By his own testimony he was 7½ or 8 feet back of the bumper (R. 24), and the bumper was 8 feet south of the nearest rail (R. 24, 25), which would locate Hawley about 15½ to 16 feet south of the south rail. Defendant's Exhibits 7 and 8 were taken 20 feet south of the south rail at about the center of the extension of 28th Street (R. 85). These two photographs in and of themselves constitute a more persuasive argument than any which we could write. They show beyond doubt that Hawley's view at that point was totally obscured except for the vertical projection of the locomotive above the cars.

In connection with the obstructions to the view we must never lose sight of the fact that the respondent had no control whatever of the placing of the cars (R. 106), nor had it any rights or duties with respect to the condition of the crossing, its sole rights being operating rights, on track No. 2.

Another possibly misleading statement appears in the last paragraph on page 15 of petitioners' argument, continuing on page 16. Petitioners there state, "When his line of vision passed the north side of Car 67009 on Track 3, Hawley had for the very first time an unobstructed view of more than 75 feet of Track 2." That much of the statement is undeniably correct. But the petitioners continue "and saw the train coming down the track" etc. That part of the statement is in direct conflict with the record, *because it was not at that point that he looked.* What does Hawley himself say? "When I first saw the train the front bumper was across both rails of the main line." (R. 26.) (It is to be observed in passing that he does not state *how far* his bumper was north of the north rail of Track 2.) Hawley continues: "The front axle, *the front drivers of the tandem tractor,* was sitting on the southernmost rail, I figured, of Number 2 track *when I first saw the train.*" (Italics ours.)

How far, then, was the bumper north of the north rail? Defendant's Exhibit 1 (R. 45) discloses that the distance from the front bumper to the center of the front wheel is 39⅝ inches. From the center of the front wheel to a point midway between the drive wheels or "drivers" is 161 inches or a total of 200⅝ inches. From this distance should be deducted the distance from the

midway point to the center of the front driver, which is shown as 23 7/16 inches. This leaves a net distance from the bumper to the center of the front driver of 176⅞ inches or approximately 14 feet 9 inches.

The distance between the rails is shown to be 4 feet 8½ inches (Plaintiffs' Exhibit A, R. 19). If, as Hawley says (and no one disputes him as to this) the center of the front driver was on the south rail, the bumper would obviously be just a little over 10 feet north of the north rail when Hawley saw the train for the first time.

Under these facts, it is small wonder that the Court of Appeals held that Hawley was guilty of negligence contributing to the accident, particularly in view of the terms of the Iowa statute requiring that the driver of a gasoline truck at a railway crossing shall stop and "shall not proceed until he can do so safely."

In passing, we cannot refrain from commenting on petitioners' statement in argument (p. 16) that "This will *permanently* prevent him from making a living by driving a truck." (Italics ours.) What is the basis in the record for this statement? The only possible basis in the record is found merely in Hawley's own statement (R. 23): "I cannot drive a truck." This obviously refers to the time of the trial and not to the future. On the other hand, what does Hawley's own doctor say? His prognosis appears at the bottom of R. 59: "This man is disabled and he is not completely disabled. *In other words, he is not unable to return to all of his work.*" (Italics ours.)

Reverting now to the interpretation which the Court of Appeals placed upon the Iowa statute, petitioners argue loudly and at length that that Court read into the statute something that was not previously there, to wit: that the driver of a gasoline transport is required by the statute to stop and to look and to listen at a point where looking and listening will be effective, so that he can know when it is safe to proceed.

This position of petitioners' counsel is wholly unfair to the Court of Appeals and demonstrates clearly that counsel have not read the opinion with care. The Court's view is clearly expressed in one of the very quotations of which counsel complains (Petitioners' argument, p. 18). The court says: "*In the light of the Iowa cases concerning the relative rights of motorist and railroad at railroad crossings,* this statute must be read to mean that the driver of one of the vehicles described shall stop within the distances specified where by looking he can see and by listening he can hear." (Italics ours.)

The propriety of interpreting statutes by comparison with the common law has been recognized as long as statutes have been interpreted by the courts. What the opinion holds in effect is that:

1. The driver of a gasoline transport is required *by the statute* to stop within specified distances before attempting to cross any railroad.

2. The driver is required *by the common law of Iowa* as determined in the *Dean* case and others to look and listen where looking will be effective.

3. The driver is required *by the statute* not to attempt to cross until he can do so safely.

4. Therefore, by a combination of the statute and the common law, such a driver is required to stop within the specified distances, to look and listen at points where it is possible to see and hear, and not to proceed until he can cross in safety.

Petitioners' counsel admit that the Iowa court has never construed this statute, and in the same breath they contend that the Court of Appeals is required to conjecture, from stray language in Iowa opinions, just how the Iowa Supreme Court might interpret it. Chief Judge John J. Parker of the Fourth Circuit in the January 1949 American Bar Association Journal (Vol. 35, p. 19 et seq.) answered that contention very thoroughly. Judge Parker says at page 21:

> "The decision goes no further than to require that federal courts in the exercise of their diversity jurisdiction follow binding state court decisions, under the doctrine of *stare decisis,* just as state courts must follow them. It does not require that federal courts follow state decisions which state courts are not bound to follow, *nor that they abdicate their judgment and enter into the field of speculation as to what state courts might do in cases which they have not decided,* nor that they follow state courts in matters of procedure or matters involving the exercise of the judicial function. What it does, and all that it does, is that, in diversity cases, it extends to the general field of decision the rules theretofore applicable to decisions interpreting state statutes or matters of local law. The matter was well put by Mr. Justice Reed in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 209, where he said;

> "'The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of "general" law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the court, and just as they have always done in actions brought in the federal courts involving what were known as matters of "local" law.'"

Further on in his article he says (p. 83):

> "The most vehement invoking of the rule generally occurs in cases to which it is not applicable at all, in cases where there are no state decisions directly in point on the question involved but tortuous reasoning from dicta or cases not in point is relied upon to support propositions that the courts of the state have never decided and no court in any state is ever likely to decide. So often is this true that the mere citation of *Erie v. Tompkins* is generally enough to raise a question as to the soundness of the proposition which is advanced—advanced as a peculiar proposition of state law which the federal courts are asked to enforce notwithstanding that reason and the current of authority are to the contrary."

In the same article Judge Parker quotes from his own opinion in *New England Mutual Life Ins. Co. v. Mitchell*, 118 Fed. (2d) 414, 420, in part as follows:

> "We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to

consider that question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

The Iowa cases cited in Division I of petitioners' argument do nothing more than to confirm the proposition that under the common law of Iowa a driver approaching a railway crossing must look where he can see and listen where he can hear. As we have pointed out, the statute imposes additional requirements upon the driver of a gasoline truck.

With respect to the cases cited by petitioner from jurisdictions other than Iowa it must be remembered that no case is stronger than the facts upon which it is based. For similar reasons authorities from a foreign state are of little value unless both the substantive and the adjective law of the foreign state are substantially the same as the law of the forum. In the case of *Dommer v. Pa. R. Co.*, 156 Fed. (2d) 716, relied upon by petitioners, both the facts and the law were different from those of the case at bar. There the driver stopped until a freight train went by and was struck by a passenger train going in the opposite direction. The statute is set out in a footnote to the opinion and differs in many respects from the Iowa statute. The lower court directed a verdict for the defendant, and a reversal ensued. But the reversal did not constitute a finding that plaintiff was not negligent. The court simply recognized the Indiana rule (which is directly in conflict with the Iowa rule)

that in practically no case can a plaintiff be held guilty of negligence *as a matter of law,* it being in substantially all cases a jury question.

This rather unusual feature of the Indiana law is brought out more clearly by the Supreme Court of Indiana in the other case relied upon by petitioners and based upon Indiana law. In the case of *Heiny v. Pa. R. Co.* (Ind.), 47 N. E. (2d) 145, there was no evidence as to whether or not there had been a compliance with the statute. The railroad attempted to rely upon the doctrine *res ipsa* loquitur, on the theory that if the driver had obeyed the statute there would have been no accident. The court merely followed the ancient doctrine that negligence will not be presumed, as pointed out in the last quoted sentence on page 24 of petitioners' argument. If the italicized language of the court just preceding that sentence is to be taken literally and by itself, then the statute is utterly meaningless. But as the court points out elsewhere in the opinion, in Indiana the burden of pleading and proving contributory negligence is on the defendant. In Iowa the burden is upon the plaintiff to plead and prove absence of contributory negligence. The Indiana court points out that in negligence cases there should be a directed verdict for defendant in no more cases than those in which a verdict should be directed for plaintiff at the close of all of the evidence, which, of course, is practically never. The court said in part at p. 148:

> "It is only when the plaintiff fails to make a case, so that it would be the duty of the trial court, or of a higher court on appeal, to set aside the verdict as not supported by any competent evidence on

some material point, that a verdict for the defendant should be directed."

Petitioners' case involving the Ohio law is in precisely the same category. That was a case involving the doctrine of the last clear chance, which as every lawyer knows presupposes negligence of the plaintiff. The court in a *per curiam* opinion said in part at page 292:

> "He (the engineer) saw the team when 1200 or 1300 feet from the crossing and nothing was done by him further to warn plaintiff of the approach of the train or to abate its speed until it had traveled about half of the intervening distance. * * * We think it was for the jury to determine whether he was guilty of negligence proximately causing the injury after the peril of plaintiff became known or was reasonably apparent to him."

Petitioners next devote several pages of argument in establishing the hornbook principle that in order to constitute contributory negligence there must be some *causal connection* between plaintiff's negligence and the accident. This proposition was fully argued in the court below, was carefully considered by the Court of Appeals, and was discussed in the opinion as follows (R. 170):

> "Hawley, if he had been looking, must have seen the train before he did; and if he had stopped at a point even where the view to the east was only 75 feet, *the collision would not have occurred.*" (Italics ours.)

And again (R. 171):

> "We think the evidence shows without question that if Hawley had stopped and looked and listened * * * where he had a view to the east * * * and where he could have heard the train, *the collision would not have occurred.*" (Italics ours.)

Regardless of all the talk made by petitioners respecting "causal connection" the Iowa law is that in order to defeat recovery by a plaintiff his negligence need not have been a proximate cause of the accident, but conduct merely contributing to the happening of the accident is sufficient. The Iowa cases are exhaustively examined by Judge Graven of the Northern District of Iowa in the case of *Mast v. Illinois Central R. Co.*, 179 Fed. Supp. 149, 159, in which the court said:

> "On the issue of the negligence of the defendant the plaintiff must establish by the greater weight or preponderance of the evidence that the negligence of the defendant was the proximate cause of the injuries complained of. *Burwell v. Sidens,* Iowa 1947, 25 N. W. 2d 864, 865. See, also, *Kemp v. Creston Transfer Co.,* D. C. Iowa 1947, 70 F. Supp. 521, 525, 526. However, in order to defeat recovery, the negligence of the plaintiff need not be the 'proximate' cause of the injuries and it is reversible error so to instruct a jury. *Meggers v. Kinley,* 1936, 221 Iowa 383, 265 N. W. 614; *Hamilton v. Boyd,* 1934, 218 Iowa 885, 256 N. W. 290; *Towberman v. Des Moines City R. Co.,* 1927, 202 Iowa 1299, 211 N. W. 854. Accord. *Anderson v. Holsteen,* Iowa 1947, 26 N. W. 2d 855; *Hellberg v. Lund,* 1933, 217 Iowa 1, 250 N. W. 192. See, also, *Stilson v. Ellis,* 1929, 208 Iowa 1157, 225 N. W. 346, where an instruction using the words 'directly or proximately contributes' was held not to be erroneous. Negligence on the part of the injured person which will defeat recovery *need only be a contributory cause and not a proximate cause. Hogan v. Nesbit,* 1933, 216 Iowa 75, 246 N. W. 270, 272; *Hellberg v. Lund,* 1933, 217 Iowa 1, 250 N. W. 192."

Petitioners next make the startling and amusing assertion that because no Iowan was among the three judges of the Court of Appeals who decided this case,

it follows logically that none of the three is capable of interpreting Iowa law as well as the trial court could determine it. At least the trial court's long experience with Iowa law was of no help with respect to the statute. During the dictation of the motion for directed verdict into the record, when the statute was mentioned Judge Dewey said (R. 71):

> "What section is that? I never heard of that before."

In calling this colloquy to the Court's attention we merely mean to point out the frankness of the trial court in admitting that he knew nothing about the statute. We do not intend in any manner to criticize or disparage Judge Dewey. He is, as the opposing counsel have said, an able and conscientious judge. But we felt at the time and still feel that despite his experience and ability Judge Dewey fell into error in failing to direct a verdict for the defendant in this case. With our view the Court of Appeals concurred.

It is our contention that there is no sufficient ground for review of that decision by this court.

B. The Court of Appeals followed precisely the applicable law of Iowa in accordance with the case of Dean v. C. B. & Q. R. R. Co., 211 Iowa 1347, 229 N. W. 223, and subsequent cases.

Very little is said in Division II of petitioners' argument that is not discussed previously in Division I. Little note need be taken of petitioners' reference to the 7th Amendment to the Constitution except to point out that no reference was made to this amendment during the trial nor before the Court of Appeals. It is mentioned

for the first time here, in a rather shamefaced manner, and properly so. If that amendment were subject to the amazingly strained construction which counsel attempt to place upon it, a jury verdict would in all cases be a finality regardless of the errors which might have been perpetrated in permitting the jury to speculate upon the case. Such is not the law.

Petitioners refer to a number of Iowa cases touching upon contributory negligence in cases of this kind, but before we go into that question we feel it to be our duty, in the interests of accuracy, to point out certain instances wherein counsel's statements in argument are not supported by, or are contrary to, the record.

For an example, counsel say on page 36 of their argument:

> "Even the train crew claimed only that the crossing signal was given at the whistle post 500 feet from the crossing."

Not the train crew, but the fireman, said he saw the truck nose out from behind the freight cars and said further:

> "There was whistling going on before that. I would judge he started to whistle 500 *or 600* feet before we got to the crossing. There is a whistling post there. *He started whistling at the whistling post.*" (R. 84) (Italics ours.)

The fireman then *estimated* the distance at 500 or 600 feet. He was *positive* about the existence of the whistling post, and that the whistling started there. (In conformity to the Iowa statute, whistling posts are 60 rods or 990 feet away from the crossing.)

The engineer, who blew the whistle, testified (R. 82):

> "I whistled for that particular crossing and that was the third time I sounded the whistle from the new track to the point of the accident, in that stretch of a mile."

While it is true that Crites (Arg. p. 49) said he first heard the whistle "possibly 200 ft. east of the crossing," it is also true that his testimony was essentially negative, for he also said (R. 49):

> "I didn't hear no bell. If a bell was rung I didn't hear it. I am not saying there wasn't one. I heard the whistle. *There may have been other whistles I didn't hear.*" (Italics ours.)

Moreover, there was no occasion for Crites to listen for the whistle or bell because he had already seen the train when he crossed the tracks a moment before (R. 48).

> " * * * there is no basis in fact in the record at all for the court's conclusions * * * ."

The record will, and does, speak for itself. It is only because counsel distort or fail to read the record that they make such extravagant and unwarranted statements.

As to whether or not Hawley was looking at all times (Arg. p. 40) it is, of course, true that he testified that he did so, but the physical facts flatly disprove his assertion. The Iowa Supreme Court has frequently held that such testimony will not raise a jury question where the physical facts disclose that if the witness actually had looked he must have seen the train approaching. One such case is *Darden v. Chicago & N. W. R. Co.*, 213 Iowa 583, 586, 239 N. W. 531, 533, where the court said:

> "Where the physical facts are such that, had the plaintiff looked for a train at the distance from the track where she said she did look, she would have seen the approaching train, her failure to see the train shows that she did not look, as she said she did, and she was guilty of contributory negligence as a matter of law. *Artz v. C. R. I. & P. Ry. Co.*, 34 Iowa 153; *Anderson v. Anderson*, 187 Iowa 572."

Again counsel claim on page 45 of their argument that because we limited our appeal to the question of plaintiff's negligence we thereby conceded our own negligence. Truly, this evidences wonderful imagination. The mere fact that we may have chosen to argue only one proposition in order to avoid a burden for the court cannot be stretched into an admission of the worthlessness of other grounds which might have been, but were not, presented. But counsel attempt to build their dream castle higher and higher upon its base of shifting sand by arguing that because we conceded our own negligence, "it would require a *very strong* case of negligence on Hawley's part * * * ." (Italics *theirs*.)

Such sophomoric effusions are nothing more nor less than insults to the intelligence of the members of this Court. Every freshman student of Torts at the College of Law at the University of Iowa knows that *any* negligence of plaintiff which contributes to his injury bars his recovery in Iowa. But even if the rule were in accordance with petitioners' daydreams, it is submitted that here there is a "*very strong* case of negligence on Hawley's part" which not only contributed to the accident but was the proximate cause thereof.

Turning now to page 50 of petitioners' argument, we find the amazing statement that:

> "*Contrary* to what the court says, his testimony was that he (Hawley) saw the train and stopped with *only the bumper of his tractor* across the far rail of track 2." (Italics *theirs.*)

We have already demonstrated in Division I that under Hawley's own testimony his front bumper could not have been less than 10 feet north of the "far rail," which would put Hawley himself at least two feet north of it when he first saw the train.

But perhaps the most startling pronouncement of petitioners' counsel is at page 55 of their argument where they say that the Court of Appeals was "ready to find" Hawley guilty of contributory negligence on the basis of *Dean v. C. B. & Q. R. R. Co.,* 211 Iowa 1347, 229 N. W. 223, "If it had not had the statute * * * to fall back on instead." (This hardly squares with their statement on page 16 that violation of the statute was the "sole reason" for reversal.) But be that as it may, the *Dean* case infra is still the law of Iowa, and even with all their temerity opposing counsel cannot deny it. Their bravest venture is to suggest that it may not still be the law.

The *Dean* case infra is, we submit, as close upon its facts to the case at bar as two negligence cases ever could be.

While it is difficult, if not impossible, to find two crossing accident cases involving exactly similar facts, the case of *Dean vs. C. B. & Q. R. R. Co.,* decided by the Supreme Court of Iowa in 1931 (211 Iowa 1349, 229 N.

W. 223), is so nearly identical in respect to the fact situation involved that the decision of the Iowa Court in that case should be controlling here. Especially is this so since, although the *Dean* case has been cited and discussed in several later decisions of the Iowa Supreme Court, it has never been criticized and is still the law of the state. The following is quoted from the opinion in that case:

> "A primary highway runs along the Chicago, Burlington & Quincy Railroad right of way for some distance west of Murray. On the day in question, and just previous to the accident, the plaintiff was driving west on said highway, intending to cross the railroad track at the private crossing, in order to reach the scene of his farming operations. Upon reaching the wagon road which leads north to defendant's right of way and forms the private crossing in question, the plaintiff turned his car to the north, and followed the wagon road until the front end of his car was about on the south rail of the railroad track, at which time he saw an engine approaching from the west, traveling about 40 or 45 miles per hour. A collision resulted, as the plaintiff did not have time to cross the track or reverse his motor and back the car off the track.
>
> "The track, for several hundred yards west of the crossing, runs through a deep cut, which prevents seeing a train approaching from the west. The vision of a traveler approaching the intersection from the south continues to be obstructed until such traveler reaches a point within a few feet of the track. On the day in question, and for a considerable period of time prior thereto, tall weeds and brush had grown up along the defendant's right of way between the tracks and the side of the cut, so that the traveler's view of the track west was obstructed, on approaching from the south, until he was within

three or four feet of the south rail of the track. The plaintiff was thoroughly familiar with all the conditions which then existed at the private crossing, having used it daily for a considerable period prior to the accident. The private roadway was narrow, and there was a steep grade or ascent leading from the wagon road to the railroad crossing. Plaintiff's contention (supported by the evidence) is that the cut came right up to the roadway on which he was traveling, and that the embankments resulting from the cut were 12 to 15 feet high. Plaintiff also contends that these weeds were so thick that he could not see through them, and that they had been there for a considerable time prior to the accident. In fact, he had noticed them for some time. When he visited his farm, he went over the crossing twice. In brief, *his contention is that the weeds, brush, and embankment absolutely obscured his view until his front wheels were about on the tracks. Plaintiff knew that he was sitting back approximately a distance of seven feet from the front end of his car, and acccording to his contention, the front end of his car would get over the south rail of the south track when he was not less than seven feet back from the rail.* He knew, therefore, that when he was about seven feet back from the south rail, his view would be absolutely obstructed to the west as to a train coming from the west. Plaintiff's eyesight and hearing were good. He testified that, when he first saw the defendant's engine, *it was 40 to 60* feet from him, and traveling *at from 40 to 45 miles per hour.* He claims that he looked for trains from the time he turned north into the private highway until he first saw the train from the west, and that, at the time he first saw the engine, he heard the whistle, but at that time, the front wheels of his automobile were over the south rail of the south track. When the plaintiff turned north off the primary road, he was traveling at a speed of from 8 to 10 miles per hour, which speed was increased slight-

ly. He had been running in high gear, and then shifted to intermediate, in order to make the grade or ascent about 4 feet from the railroad track, and on the approach to the tracks, *was moving at from 3 to 4 miles per hour.* He had traveled over the crossing that day, and concedes that the conditions were the same the first time as at the time of the accident. The plaintiff knew that passenger trains, freight trains, special trains, and single engines passed over the track in question. He testified: 'As a matter of fact, I knew that trains or engines would likely come along in either direction at any time.' He testified that, comparatively speaking, his car was a quiet-running car, though there was no device thereon to eliminate the ordinary noise made in its operation. There was no diverting circumstance. He could have stopped his car, under the conditions, within three or four feet, and so testified. He did not stop. *There is a slight dispute in the evidence as to whether or not the engine made any noise while approaching the crossing, and whether a whistle was sounded or the bell was rung. The engine had an automatic bell, and a considerable part of the testimony as to whistle and bell is negative in character: that is to say, that the witnesses were simply in a position to hear, but did not hear. The day was clear.* There was no wind.

"The primary contention of the appellant is whether or not, under the record evidence, giving plaintiff's evidence the most favorable viewpoint, the plaintiff was guilty of contributory negligence, as a matter of law. This court has repeatedly held that a person approaching a railroad crossing must recognize that it is a zone of danger, and he must be vigilant to discover the approach of trains and use reasonable care to avoid injury therefrom. Stopping or starting an automobile in perfect condition, with good brakes, going at a low rate of speed (which facts are all shown in the instant case), is a simple

movement, requiring very little time or energy. A cursory review of our own decisions is sufficient to find answer to the controlling question under the facts of the case at bar. We cite *Banning v. Chicago, R. I. & P. R. Co.*, 89 Iowa 74; *Payne v. Chicago & N. W. R. Co.*, 108 Iowa 188; *Case v. Chicago G. W. R. Co.*, 147 Iowa 747; *High v. Waterloo, C. F. & N. R. Co.*, 195 Iowa 304. We will not review these decisions in extenso, but a few brief sentences from some of them may be helpful to understand the pertinent and fundamental proposition. In the *Payne* case, supra, it is said that it is the duty of a person, before crossing a railroad track where obstructions block his view, to look and listen before going onto the crossing, and '* * * if, from any cause, he could not know, by looking or listening, while moving forward, whether or not a train was coming, he should have stopped until by looking or listening, he did know that it was safe for him to cross.'

"In the *Case* decision, supra, it is said: 'One about to cross a railway track must take reasonable precautions for his own safety. He must sometimes stop his team and look and listen * * *.'

"In the *High* case, supra, it is said: 'It is always train time at any railroad crossing,' but that 'cases may arise where, under the proven facts, the person injured has so failed to act as a man of ordinary care and prudence that the court must hold, as a matter of law, that he has been guilty of contributory negligence. * * * Under certain circumstances, it may be negligence for him not to stop, in order to listen for a train.'

"It must be conceded that at an obstructed crossing it is the duty of the traveler to exercise a greater degree of care and caution than is incumbent upon him usually, and that there may be such circumstances in a given case that common prudence requires the traveler to stop. It is elementary that, the great-

er the danger, the greater the care and caution necessary for him to exercise to constitute ordinary or reasonable care. Even the failure of the engineer to ring the bell or sound the whistle, if such be the fact, does not relieve the traveler about to cross a railroad track from the necessity of taking ordinary precaution under the circumstances which confront him. The traveler may have the right, as a general rule, to rely on the fact that a railroad company will perform its duty, either at common law or under the statute, in the operation of its train; but this fact, per se, does not dispense with the care to be exercised by the traveler, and he may be guilty of contributory negligence, under the facts of the particular case to the contrary notwithstanding. Each case must be determined upon its own particular facts. The instant plaintiff knew that he was in a zone of danger. He was acquainted with all of the facts of his environment when he approached the tracks of the defendant railroad company. True, it is the rule ordinarily that the question involved herein must be left to the answer of the fact-finding body. The case of *Hawkins v. Interurban R. Co.*, 184 Iowa 232, is distinguishable on the factual side from the case at bar. The instant case presents the exception to the general rule.

"This private crossing was exceptionally dangerous, because trains approaching it from the west came through a deep cut, which did obscure from view the engine in question, and did deaden somewhat the noise of its approach. The presence of weeds and brush obscured a train from the view of a traveler from the south, and no traveler in an automobile coming from the south to the tracks could see a train approaching from the west until the driver had propelled his automobile almost onto the tracks themselves; and he could then see but 40 to 60 feet to the west of him. The road approaching the track was rough and rutty, and steep enough so that it

required the plaintiff to shift from high gear to intermediate, so that his car could be propelled to and over the tracks. Plaintiff, with absolute knowledge of all these facts, knew that if he looked to the west he could not see an approaching train. Furthermore, we may take judicial notice that a car shifted from high to intermediate gear does create and make additional noise in its operation after the shift is made. This fact would interfere somewhat with plaintiff's hearing the approach of a train. The fact is, however, that he did not stop, and the fact stands that, had he looked to the west all of the time while approaching the tracks, he could not have seen anything until his car was on, or nearly on, the tracks. Plaintiff must have known, under the circumstances, that if he did not stop and a train was approaching which he could not see and could not hear, a collision would be inevitable.

"We hold, therefore, that the plaintiff was guilty of contributory negligence, as a matter of law, and that the trial court erred in overruling defendant's motion for a directed verdict. Reversed." (Emphasis supplied.)

The first Iowa case in which we find the *Dean* case cited is *Nurnburg v. Joyce, et al., Trustees,* 232 Iowa 1244, 7 N. W. 2d 786; the paragraph citing the *Dean* case (232 Iowa at p. 1253) is as follows:

"The evidence shows without contradiction that on November 12, 1939, Roger Nurnburg drove his car from the west onto the crossing where he was struck and fatally injured. Three eyewitnesses say that from a point 150 feet west of the crossing he drove without stopping and did not change his speed. In so doing he must be held to have been guilty of contributory negligence so as to bar recovery herein. See *Dean v. Chicago, B. & Q. R. Co.,* 211 Iowa 1347, 229 N. W. 223; *Darden v. Chicago & N. W. R. Co.,* 213 Iowa 583, 239 N. W. 531."

The *Dean* case is next cited in the case of *Hitchcock v. Iowa Southern Utilities Company of Delaware,* 233 Iowa 301, 6 N. W. 2d 29. That was an appeal by plaintiff from a directed verdict. In the course of its opinion (233 Iowa at 309) the Supreme Court said, citing the *Dean* case:

> "In *Dean v. Chicago, B. & Q. R. Co.,* 211 Iowa 1347, 1351, 229 N. W. 223, 225, we said:
>
> " 'Even the failure of the engineer to ring the bell or sound the whistle, if such be the fact, does not relieve the traveler about to cross a railroad track from the necessity of taking ordinary precaution under the circumstances which confront him.'
>
> "Although appellee did not sound the whistle 960 feet west of the crossing, this negligence did not relieve decedent from exercising due care to avoid injury, from the duty of vigilantly using all of his senses to determine whether there was danger from trains approaching the crossing."

The next case is *Coonley v. Lowden,* 234 Iowa 731, 12 N. W. 2d 870, in which the *Dean* case is cited in a specially concurring opinion. There the court said:

> "This 'stop-to-look-and-listen' rule has not found judicial approval in Iowa except in the case of *Dean v. C. B. & Q. Ry. Co.,* 211 Iowa 1347, where, under the peculiar circumstances and conditions there presented, this court held the plaintiff negligent because he did not stop his vehicle before going upon the track. From an early day, it has been the rule in this state that as trains may rightfully pass at any time, the exercise of ordinary care requires that the traveler shall look and listen, and if, to his knowledge, his view is interfered with so that he cannot see without stopping before driving upon the track, then the jury may impose upon him the duty of stopping

to look before going upon the crossing. Based upon these authorities, we say that the rule in Iowa is that if the view is obstructed, to the knowledge of the traveler on the highway, the jury may say that ordinary care requires him to stop before driving upon the track, for the purpose of making observations."

The foregoing from the specially concurring opinion of Justice J. Mulroney in the *Coonley* case, was quoted by him from the brief and argument of the defendant. Following the quotation Justice Mulroney said this:

"I agree with the foregoing statement of the Iowa law."

Further along in the same case, in a dissenting opinion by Justice Smith, appears the following statement:

"The answer is found in our own decisions, repeated over and over, both in cases where plaintiff prevailed and those in which we held he had not sustained the burden. It is reduced to a succinct and accurate statement by the Corpus Juris text writer:

" 'Where the view or hearing of a traveler approaching a railroad crossing is so obstructed that he cannot otherwise satisfy himself whether it is prudent to cross, it is his duty, where he is familiar with the crossing or aware of such facts, to stop and look or listen before going upon the tracks * * *.' 52 C. J. 309, Section 1844, citing *Dean v. Chicago, B. & Q. R. Co.*, 211 Iowa 1347, 229 N. W. 223; *High v. Waterloo, C. F. & N. Ry. Co.*, 195 Iowa 304, 190 N. W. 331; *Wilson v. Illinois Cent. Ry. Co.*, 150 Iowa 33, 129 N. W. 340, 34 L. R. A., N. S. 687; *Moore v. Chicago, St. P. & K. C. Ry. Co.*, 102 Iowa 595, 71 N. W. 569; *Nosler v. Chicago, B. & Q. Ry. Co.*, 73 Iowa 268, 34 N. W. 850; besides many decisions from other states.' "

The next and last case we have been able to find citing the *Dean* case is *Scherer v. Scandrett,* 235 Iowa 229, 16 N. W. 2d 329, which affirmed the judgment upon directed verdict against the plaintiff in crossing accident litigation. In the opinion in that case the court said:

> "Numerous later cases support the rule that in absence of diverting circumstances or deceptive appearances, a motorist approaching a crossing, who knows his view is obstructed until he is close to the track, must, in the exercise of due care, not only look when he reaches the point where looking is possible but must then have his own vehicle under such reasonable control as to enable him to stop if necessary to avoid collision. See *Hitchcock v. Iowa Southern Utilities Co.,* 233 Iowa 301, 6 N. W. 2d 29; *Nurnburg v. Joyce,* 232 Iowa 1244, 7 N. W. 2d 786; *Carlin v. Thompson,* 234 Iowa 469, 12 N. W. 2d 224; *Dean v. Chicago, B. & Q. R. Co.,* 211 Iowa 1347, 229 N. W. 223."

In the same case which was a five to four decision of the Iowa Supreme Court, the four dissenting judges, speaking through Bliss, J. said at page 261 of 235 Iowa:

> "In what particular or in general did this young man's conduct greatly differ from that of the thousands of motorists who travel over roads unfamiliar to them? *He was not looking at a place where he could not see at all as in the Dean case.* Dean v. C. B. & Q. R. Co., 211 Iowa 1347, 229 N. W. 223."

Thus it appears that the entire court recognized the *Dean* case as being the law of Iowa in circumstances such as exist in the case at bar.

We think it must be said that where the motorist's view is wholly obstructed, as Hawley claims his view was obstructed, and as Dean claimed his view was obstructed,

the law of Iowa requires such motorist to stop before going onto the track and his failure to do so is negligence as a matter of law.

A rather recent case is *Nurnburg v. Joyce,* 232 Iowa 1244, 7 N. W. 2d 786. The following quotations from the opinion will be sufficient to set forth the facts and issues involved in that case:

> "The court submitted but two of such grounds to the jury: First, the claim of the appellee that the appellant was negligent in the operation of the train, in failing to give proper signals on approaching the crossing by the ringing of the bell; and, second, appellant was neligent in that the train was traveling at the time of the collision at an excessive rate of speed at the crossing in question.
>
> "The appellant urges that the court was in error in failing to sustain the motions for a directed verdict and by overruling the same and submitting the case to the jury.
>
> "The main argument of the appellant is devoted to its claims that the appellee failed to prove that the decedent, Roger Nurnburg, was free from negligence which contributed to his injuries and death.
>
> * * *
>
> "In order to sustain the verdict herein it is necessary that the appellee show that Roger Nurnburg, decedent, was free from contributory negligence at and just prior to the time of the collision; also, that at the same time appellant was negligent, which said negligence directly and proximately resulted in the injury to Roger Nurnburg.
>
> "Appellant contends that under the record the evidence shows that Roger Nurnburg was guilty of contributory negligence as a matter of law, and such

being the case, the court was in error in failing to direct a verdict as moved for by such appellant. * * *

"Mansell Nurnburg, administrator of the Roger Nurnburg estate, and a son of deceased, aged 24, who lived with his father, stated that he traveled over this road and crossing frequently. As a witness he was asked on direct examination the following:

"'Q. Just tell the jury how close you would have to be up there to that railroad crossing where your father was killed before you would see a train coming from the north? A. He would have to be right up onto the crossing because the view is obstructed by a tree. And it is obstructed by telephone poles and those weeds and sprouts and bushes grown up there.'"

In analyzing the evidence in this case the Supreme Court of Iowa observed:

"If the view to the north from the crossing was obstructed, then there devolved upon Roger Nurnburg the duty to exercise the care and caution commensurate with the apparent danger. The physical facts show that for the 150 feet from the Cheers corner to the crossing the train could have been seen to the north at least 750 feet, or one-eighth of a mile. Assuming that the train was traveling 45 miles per hour, it would require something like 13 seconds to reach the crossing if it maintained its speed. If Roger Nurnburg was traveling 15 miles per hour and did not change his speed he would reach the crossing in about 7 seconds.

"We are of the opinion that the evidence shows that said Roger Nurnburg was guilty of contributory negligence as a matter of law, and such being the case, there can be no recovery under this record."

It is respectfully submitted that if these cases were to be determined by the Supreme Court of Iowa even

without the statute involved here the decision would be controlled by the *Dean* case. Under familiar principles it is just as controlling upon the decision of this Honorable Court. But the case at bar presents an even more aggravated case of contributory negligence than did the *Dean* case and the Iowa cases which followed it. This is because of the undisputed fact that the truck in question was loaded with 6300 gallons of gasoline (R. 20). Thus the danger inherent in the operation of the truck was far greater than would be true in operating an ordinary motor vehicle. It is elementary law that he who is in charge of a dangerous instrumentality must exercise a degree of care commensurate with the danger involved. Thus a driver of a vehicle heavily loaded with highly explosive and inflammable materials must, in the exercise of ordinary care, be held to a higher degree of care than would be the case if he were carrying a nonexplosive or noninflammable load. It was this principle that led the Iowa legislature to enact the statute involved in this case.

VII.

CONCLUSION

Whether this case be considered under the mandate of the statute, or under the doctrine expressed in the *Dean* and later cases, or under a combination of both, it is the law of Iowa that where such flagrant violation of the laws and rules of care for self-preservation and for the safety of others appears as in the case at bar, the plaintiffs cannot recover because they are negligent as a matter of

law. This is the law of Iowa. This was the decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

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